

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LAKE ELSINORE UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012080373

**DECISION**

On February 15, 16, 17, 18, 22, and 23, 2012, Judith L. Pasewark, Administrative Law Judge (ALJ) from the Office of Administrative Hearings, Special Education Division (OAH), presided at the due process hearing on this matter.

Ralph O. Lewis, Jr., Esq. represented Student (Student). Student's mother, (Mother, sometimes Parents) attended the hearing each day. Student did not attend the hearing.

Cynthia D. Vargas, Esq. represented Lake Elsinore Unified School District (District). Donna Wolter, the District's Director of Special Education, attended the hearing on behalf of the District.

**STATEMENT OF PROCEDURE**

On August 14, 2012, Student filed a Request for Due Process Hearing (complaint). OAH granted a first continuance on September 17, 2012. A series of continuances were subsequently granted. On December 19, 2012, OAH granted Student's request to file an amended complaint (amended complaint), which also set the first continuance of the amended complaint as December 19, 2012. The matter was heard on February 19, 20, 21, 26, 27, and 28, and March, 4 and 5, 2013. The parties submitted written closing briefs at close of business on March 25, 2013, and the record closed on March 26, 2013. Due to the ALJ's medical emergency and hospitalization, the parties stipulated to extending the time for decision to May 22, 2013.

## ISSUES

It is noted that Student's amended pleadings reference violations of the IDEA during the "statute of limitations time period." Student filed his initial due process complaint on August 14, 2012, thereby creating a two year statute of limitations relating back to August 14, 2010. On January 24, 2011, the parties entered into a written Settlement Agreement, which contained a release of all claims, including administrative claims, compliance complaints, and all claims implementing regulations of the IDEA and California Education Code, existing as of the date of the agreement. As a result, for purposes of this hearing, the operative period of the statute of limitation on Student's issues is January 25, 2011 through the filing date of Student's amended complaint on December 13, 2012.

The issues at the due process hearing are:

1. Did the District fail to provide Student a FAPE by failing to identify all areas of disability or suspected disability between January 25, 2011 and December 13, 2012?
2. Did the District fail to develop individualized educational plan (IEP) goals for Student between January 25, 2011 and December 13, 2012, which were not vague, measurable and appropriate for Student?
3. Did the District fail to offer Student a free appropriate public education (FAPE) during but not limited to the 2012-2013 school year, including the 2012 extended school year (ESY), by failing to offer Student an appropriate combination of direct instructional services (DIS) and classroom setting?
4. Did the District fail to offer appropriate ESY services between January 25, 2011, and December 2012?
5. Is Student entitled to reimbursement for an independent educational evaluation (IEE) provided by Dr. Robin Morris as well as her subsequent observations?
6. Is Student entitled to compensatory education as a result of the District's failure to provide Student with appropriate services for the period of January 25, 2011 through December 13, 2012?

## CONTENTIONS

Student contends that the District failed to offer Student a FAPE from January 25, 2011 through December 13 2012, thereby justifying their unilateral placement of Student at the Beacon School (Beacon). Further, Beacon has provided Student with the legal requirements of educational benefit which qualifies Parents for reimbursement of said private school tuition and costs.

The District contends that, at all times in question, it has offered Student a FAPE in the least restrictive environment (LRE).

## FACTUAL FINDINGS

### *Background:*

1. Student is a 12-year old girl who qualifies for special education and related services under the primary disability category of autism. Student also exhibits deficits in the areas of communication, sensory integration, cognitive development, academic functioning, social interaction, focus, attention, and behavior. Student and her parents reside within the District.

2. Pursuant to a written Settlement Agreement, as of January 24, 2011, Student's educational placement consisted of the alternative program at Cottonwood Canyon Elementary School (Cottonwood), which included mainstream time of lunches, recess, physical education, assemblies and music. On March 11, 2011, an IEP meeting was held to amend the Student's 2010 IEP due to the settlement agreement. Parents were represented by their advocate, Steven Figueroa. The IEP notes reflect that Parents raised their concerns regarding the maladaptive behaviors of the other students in class, and the curriculum being over Student's head. The District also shared its "progress" on settlement issues, such as iPad training, OT, and mainstreaming opportunities. Formally noting their parental concerns, Parents consented to the remainder of the Amendment IEP. Student completed the 2011-2012 school year in the alternative program at Cottonwood.

3. Pursuant to Student's annual IEP meeting on May 8, 2012, the District offered Student placement and services in the alternate program at Canyon Lake Middle School (Canyon Lake) for the 2012-2013 school year. Parents disagreed, and unilaterally enrolled Student at Beacon, a non- public school (NPS), located in La Palma, California. Parents notified the District they were seeking reimbursement for Student's placement at Beacon.

### *Dr. Patterson's 2010 Psychoeducational Assessment:*

4. Dr. Robert Patterson, Psy.D.,<sup>1</sup> administered an extensive psychoeducational IEE of Student between June 8 and August 12, 2010, which culminated in a final written report dated August 17, 2010. Dr. Patterson's expertise is well known to this ALJ and the California special education community, to wit, the parties stipulated to the evidentiary entry

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<sup>1</sup> In addition to having earned a Psy.D., Dr. Patterson is a licensed psychologist, licensed educational psychologist, nationally certified school psychologist (NCSP), licensed marriage, family and child therapist, nationally certified counselor (NCC), nationally certified gerontological counselor (NCGC), and a diplomate of school neuropsychology (ABSNP).

of Dr. Patterson's August 17, 2010 report, without need of additional testimony or dispute regarding its contents and findings. While Dr. Patterson's report precedes the statute of limitations in this matter,<sup>2</sup> each party contends that Dr. Patterson's report bears a significant relation to the one or more of the current issues. Therefore, Dr. Patterson's assessment observations and findings are briefly reported as they relate to matters in issue.

5. Dr. Patterson observed Student in her special day class (SDC). Student exhibited significant autism. At that time, Student self-stimulated through repetitive finger play. She was quiet, but focused, and when asked questions she could answer the teacher or the aide. Although Student's classroom contained between eight and 11 students, two aides, and the teacher, Student was not receiving any applied behavior assessment ABA type of activities. She was able to do group work, and was participating in group reading, written language, and math. Although Student appeared to ignore the teacher and aides by not looking at them, she was still tuned-in and took all of the directions, and could follow through with minor prompting. Student did not participate in a group review activity and instead stimmed throughout this task. When called up to the front of the class, however, Student was able to perform a counting task without any difficulty. Student worked with another student with whom she was able to communicate quite well, thereby exhibiting some relationship social skills. Student was self-sufficient in the classroom. She appeared to be doing very well in the class and was generally social. While Student was reported as academically the highest in her class, she was also the oldest (and tallest).

6. On the other hand, Student exhibited several weaknesses. As of August 2010, Student was not toilet trained. Student held her pencil in somewhat of a fist grip which made writing difficult for her. Student required prompting and frequent refocusing. The teacher indicated concerns regarding Student's safety. Although described as not really violent, Student engaged in low frequency high incident activities which placed her at risk. It was reported Student had been fairly free of those types of behaviors until she was moved to eating in the cafeteria at noon. Once moved, Student's behaviors increased, such as pulling out her eyelashes, sitting on the toilet with her pants on, and developing increased impulse and control issues. Again, those behaviors died down to a certain extent in the then current school year. Student's teacher maintained a file of the incidents that had occurred and a daily behavior log that she kept on Student. Based upon a review of the logs and discussions with the teacher, it was noted that Student had a reduction in incidents and was not showing or demonstrating the kinds of behaviors she demonstrates at home, according to Parents. Dr. Patterson suggested the possibility that more consistency or a different behavior company was required to provide behavioral work that needed to be focused in the home and then collaborated with the school or wherever Student was placed. It was further noted that when Student was observed in the office with Parents, her behavior was considerably different. Student had more control issues and had a difficult time with focusing when Parents were attempting to focus her and control her behavior. Some of the parental

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<sup>2</sup> Dr. Patterson's report was first discussed at an IEP addendum meeting held October 7, 2010, and was further reviewed at Student's triennial IEP meeting on October 25, 2010

interactions with Student appeared to reinforce inappropriate behavior, so the need for significant parent training was mentioned.<sup>3</sup>

7. Dr. Patterson administered to Student a plethora of standardized testing, along with parental and teacher checklists and ratings scales. Without commenting on each test, which can be found at length in the written report, Dr. Patterson's summary shall suffice for this hearing. Specifically, as of August 12, 2010, Student was performing in the range of Mild Mental Retardation<sup>4</sup> based upon the results of the Kaufman Assessment Battery for Children-Second Edition (KABC-II). Achievement wise, Student exhibited relative strengths in recognizing consonant-vowel-consonant (CVC) words, Spelling, and Reading Recognition, performing in the Borderline range, but she was performing Significantly Below the Average range in Reading Comprehension, Applied Mathematics, and Calculational Skills.

8. Student's Language Functioning was Significantly Delayed, in the range of Mild Retardation. Student's Sensorimotor Functioning scores were on the cusp between Borderline and Mild Retardation. Student's scores indicated significant difficulties with accuracy on paper and pencil type tasks, and motoric components of executive processing. In the areas of Attentional Functioning, Student exhibited very elevated scores for Inattentively, Hyperactivity/Impulsivity, Aggression, poor Peer Relations, and Learning Problems. Student showed elevated scores in Executive Functioning, but exhibited relative strengths (Borderline) in Working Memory, Fluid Reasoning, and Planning. Her Memory Functioning, however, was in the range of Mild Retardation, and was more significantly delayed for long-term rather than short-term retrieval. Student's Adaptive Functioning was in the range of Mild Retardation.

9. Student's Autism assessments indicated that she exhibited a combination of autistic-like behaviors which included: (1) an inability to use oral language for appropriate communication, with which Student clearly has problems; (2) a history of withdrawal, difficulty with relating to people; (3) an impairment in social interaction, which she has clearly demonstrated; (4) an obsession to maintain sameness; (5) a preoccupation with objects or inappropriate use of objects, or both, which she currently exhibits; (6) resistance to control, which Student has clearly demonstrated in both the educational setting as well as in the clinic setting; (7) peculiar motoric mannerisms and motility patterns. Student is a loner, and will attempt to AWOL; and (8) Student will hand-flap and engage in a variety of stimulating ritualistic behaviors.<sup>5</sup>

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<sup>3</sup> This comment is not, under any circumstances, intended to suggest or place fault on Parents. Rather, it is intended to indicate the chasm in Student's behaviors existing in 2010.

<sup>4</sup> Mental Retardation is now referred to as Cognitive Impairment. Dr. Patterson's report, however, shall remain as reported in 2010.

<sup>5</sup> While Dr. Patterson made a series of recommendations, they are not at issue in this matter.

*2011 Cottonwood Alternative Program:*

10. Pursuant to the terms of the Settlement Agreement, Student was placed in the Cottonwood alternative program on January 31, 2011 and remained there until the end of the 2011-2012 school year.<sup>6</sup> Allison Mativa was Student's teacher during this time. Ms. Mativa has worked for the District for several years in various capacities, including resource teacher, special education teacher in both the alternative program and special day class (SDC), and fourth grade general education teacher. Ms. Mativa has a special education credential (mild/moderate) and a general education (multi-subject) credential.

11. Ms. Mativa's alternate program at Cottonwood educated six special education students, with several areas of disability, including three students with autism. In addition to Ms. Mativa, the classroom had one classroom aide, and three of the six students had one-to-one (1:1) aides, including Student, who had a 1:1 aid provide by the Center for Autism and Related Disabilities (CARD). The District continued to provide Student with a CARD 1:1 aide at school as well as CARD services at home after the Settlement Agreement expired. Student's placement in a District SDC would have presented a wider range of disabilities as well as a wider range of severity of those disabilities, and the student-to-adult ratio would have been higher.

12. Student spent a significant time questioning Ms. Mativa regarding the sins and omissions of the District's implementation of the 2011 Settlement Agreement. These discussions were often beyond the scope of this due process hearing. Additionally, Student filed a compliance complaint with the California Department of Education (CDE) on May 3, 2011, to address these issues. CDE found the District out of compliance, and the District provided Student compensatory services pursuant to CDE edict.

13. Ms. Mativa's recollection during this time frame, however, provides relevance with regard to her observations and interactions with Student for purposes of determining Student's progress on annual goals and present levels of performance (PLOP) as discussed at Student's annual IEP held on May 9, 2011. It is also noted that, although Ms. Mativa is considered Student's *primary* teacher for the period of January 31, 2011 to June 2012, she was on leave for several month during this time period, with her class being taken over by Lisa Campbell in October 2011 and Patricia O'Toole in January-March 2012.

14. Student entered the alternative program classroom on January 31, 2011, for the second half of the fourth grade. In creating Student's educational program, Ms. Mativa

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<sup>6</sup> It is noted that pursuant to the Settlement Agreement, Student's placement in the Cottonwood alternative program constituted a FAPE as of January 24, 2011, and the Cottonwood placement would remain as stay put in the event of a disagreement.

utilized fourth grade state standards and Student's 2010 IEP goals<sup>7</sup>. She did not utilize the 2010 PLOP's as they were too old. Instead, based upon her initial observations of Student, she adjusted Student's instructions, making sure the curriculum was not too difficult for her. Ms. Mativa was aware of Student's maladaptive behaviors. Student entered the class in January 2011, with vocal outbursts; she pulled out her eyelashes; and she punched herself. Student also had toileting issues, and would dunk herself or body parts into the toilet or other standing water, requiring a change of clothing. Student's behaviors, however, changed over the school year, and she created new behaviors, some even more intensive. As an example, Student's dunking was more frequent in the beginning, but occurred only five to 10 times in total over an 18-month period.

15. Ms. Mativa worked on Student's behaviors in collaboration and consultation with the CARD staff.<sup>8</sup> The CARD staff indicated that Student's behaviors were primarily attention seeking, and suggested that Ms. Mativa ignore these behaviors. This was often successful, however, when one behavior was extinguished, another might take its place. Further, many of Student's behaviors were cyclical, and would disappear for a time and reoccur later.

16. Student also exhibited sensory seeking behaviors. In response to these, Ms. Mativa collaborated with Student's Occupational (OT) therapist. Student was provided with arm socks and fidgets for the classroom. Student was provided access to the sensory room and/or was allowed to take walks with her aide when stressed.

17. Lisa Campbell acted as a substitute teacher in Student's Cottonwood classroom for 16 days in October 2011. At that time, Ms. Campbell held a 30-day Substitute credential which allows her to substitute teach up to 30 days. She has no special education credential, however, she is the parent of an autistic child. Ms. Campbell returned to the Cottonwood classroom from January 2012 to the end of the school year as a para-educator (aide) assigned to Student. A para-educator may provide educational support to students under the direction of a credentialed teacher (Ms. Mativa and Ms. O'Toole). Ms. Campbell did not attend any of Student's IEP meetings, nor did she review Student's IEP. She was, however, aware of Student's goals and wrote daily logs regarding Student.

18. Ms. Campbell acknowledged Student's maladaptive behaviors, such as pinching, cutting or pulling hair, and screaming. She recalled Student dunking in the restroom and diving into a muddy planter. Ms. Campbell stressed, however, that these

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<sup>7</sup> The 2010 IEP goals were part of Student's October 25, 2010 IEP and were accepted as FAPE as modified in the January 24, 2011 Settlement Agreement.

<sup>8</sup> Pursuant to the Settlement Agreement, CARD was contracted to provide Student with an ABA aide to provide 1:1 service during the school day, as well as during transportation to and from school. Clinic based services were also provided in the school setting to provide CARD, Parents, and the District staff to collaborate on Student's educational program.

behaviors fluctuated and did not occur on a daily basis. The CARD aide provided redirection and addressed Student's behaviors. The CARD aide was also present during Student's lessons collecting data.

19. In October 2011, Ms. Campbell recalls Student's class as having a staff of five people; three of whom were 1:1 aides. The class contained six students. She recalls that, although there was sometimes noise in the classroom, the noise did not distract Student.

20. Student was not often removed from the classroom. Ms. Campbell reports that Student did not adopt negative behaviors from other students in class. To the contrary, a majority of times Student did not exhibit negative behaviors, and she was often a model of good behavior for others. At hearing, Student challenged Ms. Campbell's reporting of Student's behaviors, by referencing the CARD data logs. Such comparison is faulty. Ms. Campbell did not record the data, CARD did; the data collected involved events to which Ms. Campbell was not present; and Ms. Campbell did not define the behaviors which were measured. Instead, Ms. Campbell's testimony simply revolved around her observations and experiences with Student.

21. Ms. Campbell believes Student made progress in the Cottonwood program. Student was beginning to achieve increased independence; she was asking for the restroom and breaks; and she was making academic progress. In October 2011, Ms. Campbell reported Student's academic levels at beginning kindergarten. By June 2012, Student was performing at the mid-second grade level. Student was using an iPad and had access to computers. With prompting, she socialized with other students in class. She participated in music class with typical peers, as well as "safe play" (P.E.) with typical peers.

22. Subsequent to its opening for the 2012-2013 school year, Ms. Campbell observed the Canyon Lake alternative program and, based upon her experiences with Student, believes it would have been appropriate for Student and met her educational needs.

*Student's Behaviors Prior to May 9, 2011:*

23. As of January 25, 2011, Student received behavior and ABA services from CARD. Student's program consisted of 15 hours of 1:1 therapy per week; four hours of supervision per month; six hours of clinic attendance per month; and 30 hours of school shadow. Continuing with CARD services was very important to Parents, and throughout the statutory period herein, Mother has expressed satisfaction with CARD and deemed the home CARD goals appropriate. Parents are clearly very supportive and fond of the CARD program and its staff. Mother stated she considers CARD "like family."

24. Michelle Martinez is Student's CARD case supervisor, having previously been a case manager, and therapist providing 1:1 ABA services. Ms. Martinez holds an M.A. in human behavior and is currently seeking her board certification in behavior analysis (BCBA). Ms. Martinez has worked with Student since 2011 at home, in supervision and in clinic. Her duties have included writing the CARD Quarterly Reports.



25. CARD's Quarterly Program Report (January 1, 2011 to March 31, 2011) reported that Student engaged in multiple maladaptive and stereotypical behaviors. These behaviors included noncompliance and body, vocal, and visual self-stimulatory behaviors or stereotypy. Student had a Behavior Intervention Plan (BIP) in place, in which CARD staff consistently redirected Student's behavior throughout therapy sessions, and tracked and recorded these behaviors for noncompliance and stereotypy.

26. CARD defined Student's noncompliance as not following through with a known demand within five seconds of when the demand is placed. This behavior might be accompanied with the throwing and/or dumping of objects. The function of Student's noncompliance was escape or avoidance. For Student, intervention consisted of antecedent modifications and positive reinforcement upon appropriate compliance. Additionally, if Student was unable to comply with a specific command, she would be redirected to simpler tasks repetitively to establish behavioral momentum. While Student's rates of noncompliance were inconsistent between December 2010 and March 2011, overall, the number of noncompliant incidents decreased dramatically. Ms. Martinez reported that Student's more aggressive behaviors, such as punching and scratching, developed later in 2011.

27. CARD defined Student's body self-stimulatory behavior (SSB) as the slapping of thighs or arms with open hands. The function of body SSB behavior is automatic reinforcement. CARD defined Student's vocal SSB as repetitive words and phrases or nonsensical sounds. This behavior might be accompanied by tongue clicking. The function of vocal SSB was also automatic reinforcement. CARD defined Student's visual SSB as Student manipulating fingers and bringing them close to her eye in her peripheral vision. Likewise, the function of visual SSB was also automatic reinforcement. For all self-stemming behaviors, CARD adopted antecedent modifications which utilized Functional Communication Training (FCT) and positive reinforcements for Student throughout sessions. Differential Reinforcement of Incompatible behavior (DRI) was the intervention used for self-stimulatory behaviors. Between December 2010 and March 2011, all of Student's reported self-stimulatory behaviors decreased significantly.

28. CARD also reported that Student engaged in inappropriate restroom behaviors. Examples of these behaviors included dunking her pants or body parts (knee or foot) into the toilet. Student also plucked her eyelashes. Finally, CARD reported Student worked in a 1:1 setting for the majority of her day completing IEP goal assignments, and Student's 1:1 CARD shadow aide provided appropriate prompts throughout Student's school day.

29. The Card Progress Report for April 1 through June 30, 2011, is similar to the prior report, however, aggression was added to Student's maladaptive behaviors. The report notes indicate that aggression had been tracked that quarter, and a behavior intervention plan (BIP) was put in place.

*Occupational Therapy:*

30. Pursuant to the Settlement Agreement, the District provided Student with two, 30-minute individual OT sessions per week. In April 2011, also pursuant to the terms of the Settlement Agreement, the District referred Student to Gallagher Pediatric Therapy (Gallagher), a non-public agency (NPA) for an independent, school based OT evaluation. This assessment culminated in a written report prepared by Erica Hernandez, OTR/L. Ms. Hernandez is a licensed occupational therapist and has been working in pediatric OT for 14 years.

31. The District noted areas of concern were: (1) Student gets anxious or upset if a task is too difficult; (2) Student needs to be reminded to use a correct pencil grasp; (3) Student can get over stimulated without frequent breaks; and (4) Student fidgets and gets anxious or frustrated if she can't express her wants and needs. Student's teacher, Ms. Mativa, confirmed the District's concerns by acknowledging Student had difficulty with self-regulation when confronted with a difficult task or if working on a task too long. Ms. Mativa reported Student's 1:1 aid provided Student with sensory brakes, and Student had access to a variety of equipment in the classroom, including a thera-band on her chair, body sock, weighted lap pad, bean bag chair, chew stick, play dough, and an iPad. Ms. Mativa further reported that Student's behaviors had improved since she transitioned into her class in January 2011.

32. In addition to administering OT testing, Ms. Hernandez observed Student in the classroom, on the playground, during her speech session, and during an assembly. She interviewed Student's classroom teacher, speech therapist, and daily 1:1 aide. Additionally, Ms. Hernandez reviewed Student's records and the 2010 OT triennial report.

33. Ms. Hernandez administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT2) which was used to measure Student's fine motor and gross motor control skills in the areas of: (1) fine motor precision; (2) fine motor integration; (3) fine manual control; and (4) manual dexterity. Student's skills ranged from below to well below average. Although Student had been cooperative and participated in all OT directed tasks, she sometimes needed directions repeated and required additional visual and gestural prompts to understand the directions. As a result, Ms. Hernandez acknowledged Student's scores could in some instances be skewed, and should therefore be interpreted with caution. As an example, Ms. Hernandez admits she varied from the standardized test manuals by expanding on the questions and directions for Student. She does not believe this invalidated the assessment as she used a variety of tools and did not rely solely on the test scores. If anything, Ms. Hernandez believes that Student's OT skills may be higher than the test scores reported, due to Student's difficulty following directions.

34. Parents were given the Sensory Profile questionnaire which provides a standard method to measure a Student's sensory processing abilities and the effect of sensory processing of functional performance in Student's daily life. The Sensory Profile School Companion (SPSC) questionnaire was given to Student's teacher to measure Student's

sensory processing abilities and their effect on Student's functional performance in the classroom and school environment. While the Sensory Profile scores were reported, the report does not provide a "layman" interpretation of those scores. Suffice it to say, Parent found Student exhibiting a score of "definite difference" (from the norm) in her processing skills, sensory seeking, and behavioral/social emotional responses, although she exhibited "typical performance" in other, lesser questioned areas. The teacher's SPSC scored lesser differences (typical performance to probable difference) in all areas, with the exception of Student's availability for learning, in which Student exhibited a definite difference from the norm.

35. Ms. Hernandez also made clinical observations of Student's organization of behavior and play skills. Organization of behavior refers to Student's activity level, performance of goal directed behaviors, attention to task, purposefulness of play, and reactions to change in her environment. During this observation, Student was able to tune out irrelevant stimuli in her classroom when working one-to-one with her 1:1 aide and during her speech therapy session while an assembly with loud music was going on outside. Student was able to appropriately transition between her classroom and the restroom, the classroom and the playground, etc.

36. Student participated in fine motor and visual motor tasks while sitting at a table. Student occasionally asked for sensory items, such as the swing, and was given a few movement breaks between testing. During this testing Student had one incident in which she became overloaded and swiped the items from the table. She was easily redirected by her 1:1 aide, and after being given a break, Student easily returned to the task.

37. Ms. Hernandez noted that, on the second day of testing, Student's routine had changed. Student had a substitute 1:1 aide, she had not been able to ride the school bus, her speech therapy session was held in a different room, and there was an assembly with loud music taking place outside the room. In spite of this, Student adapted appropriately to the changes in her routine. As an example, in speech therapy, Student was able to stay on task for 15 minutes before being given a break. After speech therapy, Student attended the assembly for 30 minutes. When she returned to class, Student had a spelling test, and then was given a language arts worksheet to work on with her 1:1 aide. While working, Student utilized OT a few times, and she sat appropriately and did not exhibit extraneous body movement. She was given a break after 20 minutes.

38. Ms. Hernandez also observed that Student exhibited some self-stemming behaviors such as clearing her throat and widening her eyes. These behaviors are believed to be attention seeking, and ignoring the behavior has helped. Student's 1:1 aide reported that Student previously pulled her eyelashes, hit her leg and vocalized, which are behaviors Student no longer exhibited.

39. Student's neuromuscular system, which is the foundation for gross and fine motor movements tested within functional range. Her sensory processing or sensory

integration also tested within functional range. Overall, Student's fine motor skills and visual motor skills were functional.

40. Ms. Hernandez concluded her report by acknowledging that the purpose of OT services under the IDEA was to allow a child to benefit from his/her education program, and serve a supportive role in helping a student participate in the school environment, curriculum, and educationally related learning experiences. In making such a determination, Ms. Hernandez recognized that the development of Student's sensory and motor functioning is impacted by her neurological, physiological and structural makeup, which must be considered when making appropriate recommendations regarding the delivery of OT services. Having thus considered, Ms. Hernandez concluded that, due to her current areas of strengths as related to ability to participate in her (then) current educational program, OT services were not recommended. Instead, Student would continue need to practice and repetition to refine her writing skills, which could be appropriately met in her classroom program.

41. In testimony, Ms. Hernandez supported her findings. She noted that Student's communication was functional. Although Student had difficulty initiating, and difficulties when frustrated, she was still able to get her needs met. Although Student exhibited behaviors, i.e., swiping the table, there were no behaviors which created a barrier to Student's education. Student could get overstimulated or overwhelmed, but she was generally able to stay on task. Student did a good job of self-regulating, responded to reinforcements, and had lots of supports in the classroom. Both Student's teacher and speech and language pathologist (SLP) indicated Student was making progress. As a result, Student's OT needs were being met at school in the Cottonwood alternate program.

42. Kristine Penwarden has addressed Student's OT needs since 2008. Ms. Penwarden is a District OT therapist. She has a M.S. in OT, and is a licensed OT. In addition to educational OT, she also provides medical OT. The majority of her District caseload is autism related; however, she also serves many cognitively impaired students. Ms. Penwarden provides OT consultation to Ms. Mativa's alternative program, and she attended Student's IEP meetings.

43. Ms. Penwarden reported that Student exhibits sensory, anxiety, and obsessive compulsive disorder (OCD) based issues. She is also aware that Student was cognitively impaired. Ms. Penwarden has observed Student at Cottonwood. Ms. Penwarden is in Ms. Mativa's classroom almost daily as her office is on the Cottonwood campus. She has observed Student on the playground, in the lunch area and during assemblies. From January 2011 to June 2012, Ms. Penwarden observed a big increase in Student's communication abilities. She reported Student could perform more tasks; she was more engaged; and she was more easily redirected.

44. Ms. Penwarden acknowledged Student's behaviors and reported that Student would pull her hair when overstimulated. That behavior, however, stopped for a time, and then re-emerged. As reported by others as well as by Ms. Penwarden, Student's behaviors

would often change, and could even be affected by the weather. Ms. Penwarden also noted that not all of Student's behaviors were sensory related. She found that Student's screaming and pinching were not sensory related, and were more akin to attention seeking or task avoidance. Student's hair pulling was more an OCD issue. Many of Student's behaviors were anxiety related, and not sensory in nature.

45. In the Cottonwood classroom Student often worked 1:1 and received lots of sensory supports in class, such as reflex integration, a sensory diet, and fidgets. The class had access to the motor equipment lab, with swings, ramps, trampolines, etc., as well as a quiet corner. Ms. Penwarden also reported that Canyon Lake had a similar motor lab.

*Speech and Language:*

46. Pursuant to the terms of the Settlement Agreement, the District agreed to increase Student's speech and language services consisting of two 30-minute sessions per week in small group setting with no more than four students, and two 30-minute sessions per week of individual speech services, to be provided by a District SLP. Additionally, the District agreed to pay for an independent speech evaluation (IEE) to determine the level of speech intervention to meet Student's needs.

47. The speech IEE was obtained from the Encinitas Learning Center, and was conducted by Lynda Detweiler-Newcomb, MACCC-SLP, A.C.E, and clinical speech pathologist. Ms. Detweiler-Newcomb did not testify at hearing, however, her written assessment report, dated May 9, 2011, was entered into evidence. Ms. Detweiler-Newcomb did attend the May 9, 2011 IEP meeting to present her report and recommendations.

48. The report indicates that Parents and their advocate sought the evaluation to assess their concerns over Student "not progressing to her optimum both functionally and academically." Data for this evaluation was obtained through standardized testing, record review, including Dr. Patterson's 2010 IEE report, parent interview, as well as informal observation interacting in the movement room. Student's hearing was found to be within normal limits.

49. Ms. Detweiler-Newcomb administered the Goldman Fristoe-2 Test of Articulation to evaluate Student's sound production development. While Student scored in the below average range for her chronological age (5.3 years), her scores showed an improvement over previous testing. Most of Student's utterances are readily understood by an average listener, and she is able to get her basic wants and needs met with spoken language. Student produced a robotic quality in her utterances. Further, Student exhibited difficulty processing sounds adequately in which an audio processing deficit may be a factor.

50. Student was given the Receptive One-Word Picture Vocabulary Test (ROWPVT) which measured Student's receptive vocabulary development (comprehension).

Again, Student scored below her chronological age (4-3 years), however, there had been minor improvement since her last evaluation in 2008.

51. Student was also given the Clinical Evaluation of Language Fundamentals (CELF-4). A CELF-4 subtest scored Student's expressive vocabulary development in a range similar to that of her receptive vocabulary, again with minor improvement. A CELF-4 subtest was used to measure Student's concept development, however, Mother indicated that she didn't think Student was able to correctly respond because she did not understand the test content. Student's scores indicated a less than seven years of age equivalency or the .1 percentile. Student's expressive production of grammatical structures were limited. Student did not volitionally produce plurals, past tense, conditional or future tense. As previously noted, Student's auditory processing deficits prevented her from scoring. At best, Student fell in the "emerging language stage," in which her language skills are beginning to emerge but have not yet been mastered. The assessor suggested that Student may produce grammatical structures in a structured therapy setting, but she could not generalize these skills independently. Further, it was observed that Student had the ability to memorize well enough to perform tasks, but did not necessarily comprehend the significance of her utterances to impact her daily life.

52. Another subtest of the CELF-4 was used to assess Student's pragmatics/social skills and behavior. Student's pragmatic scores indicated an inadequate communication ability in context, indicating a continuing need for close supervision. Oddly, Mother reported to the assessor that Student was able to interact on the playground with neuro-typical children and they helped show her games. As a result, Student had become quite adept at playing tetherball.

53. Ms. Detweiler-Newcomb used the Patton-Ratner to assess central auditory processing disorders, and determined that Student's secondary auditory processing disorder is more than likely related to cognitive delay, language disorder, poor attention and autism. Student exhibited an auditory associative deficit which is a deficit in applying the underlying rules of language to incoming acoustic signals. As a result, behaviorally, Student may exhibit specific deficits in receptive language skills, vocabulary, word-naming skills, and verbal and written language skills. Pragmatic language and social communication skills may be impaired because Student is unable to make the necessary associations among acoustic-linguistic targets in order to understand jokes, riddles, jargon, or idioms. Additionally, Student exhibited an output-organizational deficit, which is a deficit in the ability to organize, sequence, plan or recall appropriate responses. This type of deficit exhibits poor performance with background noise, target reversals, and poor recall word retrieval. As a result, Student might have difficulty following directions, taking notes, or remembering tasks independently.

54. Celeste Solomon, a District SLP, testified at hearing. Ms. Solomon has been a SLP for 22 years and has experience with many disabilities, including both cognitive and developmental delays, and autism. She has worked for the District for two years, and is

assigned to provide speech and language services at both Cottonwood and Canyon Lake. She presented as a qualified SLP.

55. Ms. Solomon provided Student's direct speech and language services during the 2011-2012 school year. Student received services three times per week in both individual and group settings, which focused on functional skills, pragmatics, and social skills. Based upon her observations and work with Student, Ms. Solomon found the Cottonwood setting educationally appropriate for Student. Student made progress and Ms. Solomon was able to fade prompting. Student became more independent. Her eye contact improved. Ms. Solomon described Student as a "responder." Student does not usually initiate communication. While in the Cottonwood program, Student's ability to respond improved and she was beginning to understand sequencing. Over time, Student became more independent. Student's pragmatics were low, but improved over time in a limited way. Ms. Solomon acknowledged Student's articulation deficits. She explained, however, that Student's articulation did not meet the education code criteria for services.<sup>9</sup> Further, Student presented with cognitive deficits, and did not understand or recognize her articulation error, which is necessary for improvement.

56. Ms. Solomon reported her observations of Student's behaviors. She has seen Student pinch, swipe tables, cut hair, and laugh inappropriately. Of particular note, is the report that Student's behaviors occurred in somewhat of a circular pattern. Student's behaviors would decline over time; the CARD aid would decrease prompting, then Student's behaviors would begin to increase again. Ms. Solomon considered CARD an active partner with her. Ms. Solomon opined that, although Student's behaviors clearly interfered with her ability to access her education, the behaviors were "in the moment." Ultimately, Student could still be redirected, regain focus, and function up to 45 minutes at a time.

*May 9, 2011 IEP Meeting:*

57. The District held Student's annual IEP for the 2011-2012 school year on May 9, 2011. The IEP was attended by all statutorily required parties. Both of Student's parents attended this IEP meeting with their advocate, Steven Figueroa. Additionally, the CARD supervisor, OT therapist, and SLP attended this IEP meeting.

58. At the time of the IEP meeting, Student remained placed in the Cottonwood alternate program pursuant to the Settlement Agreement. Student's PLOP's, prepared by Ms. Mativa, indicated that Student "appeared to enjoy attending school and interacting with her peers. She has transitions very well into the new classroom placement." Parents, on the other hand, expressed concerns that the alternate program placement was inappropriate because: (1) it was "way over Student's head"; and (2) the behaviors of Student's classmates were impeding Student's education, as Student imitated and mimicked everything she observed, i.e., violent behavior and the yelling of obscenities. They reported that Student had become increasingly aggressive with her parents and tutors, and required intensive help

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<sup>9</sup> California Education Code, section 56333, subdivision (A)(a).

through continuing CARD behavior intervention. Parents also requested that Student have the opportunity to become more mainstreamed. This request is notably at odds with their parental request that Student be removed from Cottonwood and placed at the Beacon School (Beacon), a non-public school for autistic children.

59. Out of 21 goals created in Student's 2010 IEP, Student met her two goals in social cognition and coping strategies, and partially met 11 additional goals. Student did not meet the remaining eight goals, in academic areas, such as reading, reading comprehension, math, writing, and communication.

60. In determining Student's PLOP's, it is clear there was discussion at the IEP meeting, as the document contains handwritten additions and deletions. In academic areas, the IEP team reported Student's reading level at kindergarten-beginning first grade with minimal support. Student was struggling with comprehension and prediction skills. Student also struggled with punctuation, but was writing single sentences with minimal support; she required lots of prompting for content during writing activities. In math, Student could do addition and subtraction problems up to 10 with minimal support on the calculator, but required frequent prompting for Touch Math. In communication, Student could initiate short sentences, but did not accomplish her communication goals. Student's PLOP's referenced the findings of both Ms. Detweiler's and the Gallagher assessments.

61. Ms. Mativa's reporting of Student's social emotional/behavioral PLOP's indicated that Student had adjusted very well to the Cottonwood alternative program classroom setting. Student followed all classroom routines and was a great role model. Student was described as very compliant and as following directions well. Student had adapted well to the routine, schedule and transitions of the classroom. She was able to participate in small group instruction with appropriate supports. If prompted, Student would interact with other students, but needed reminders for eye contact, appropriate greetings, and appropriate spacing between others. Student required high supervision during activities with scissors and when around water, such as puddles and toilets. Lastly, Student still had toileting issues, but had been dry with 94 percent accuracy across three weeks with restroom breaks every 45 minutes.

62. In response to Student's needs, the IEP team created 20 goals for Student. Academic goals were created in reading to assist in blending and decoding words; reading comprehension to develop answering who/what questions about materials read; and identification of 300 Fry words. A writing goal was created to address punctuation. Math goals included performing addition and subtraction with manipulatives and counting. Student's toileting goal addressed Student wearing underwear at school with no accidents 100 percent of the time.

63. As Student had not met her communication goal, the IEP team kept similar goals to the 2010 IEP. Student's communication goals were amended to seek Student demonstration of coordination of actions with peer play partners, turn-taking and appropriate responses to peer's bid for joint attention; answering "wh" questions presented in random



format, with limited prompts; following two-part instructions; initiation of communication using question words for preferred objects and activities (May I have....) in a variety of environments.

64. To support these goals, the IEP team offered specialized academic instruction (SAI) in a separate classroom with six students or less; ten 30-minute sessions of OT per year; speech and language therapy 30 minutes, three times per week; individual behavior intervention services for the entire school day, five times a week, provided by CARD; 15 hours per week of individual CARD services in the home, eight hours per month of CARD supervision and 12 hours per month of CARD clinic. To implement this IEP, the IEP team offered continued placement in the Cottonwood alternative program. Additionally, the IEP team offered ESY for 2011, four days per week, implementation of the reading program, Fast4Words, during ESY, and individual CARD services for the entire ESY program. Student's offer of placement provided mainstreaming time with same age peers 20 percent of the school day, consisting of lunch, recess, safe play, assemblies, and music.

65. The IEP notes reflect parent participation in addressing the toileting and transportation issues. Parents addressed Student's aggressive behaviors at home, and requested Student's antecedent worksheet with CARD. Both District staff member and CARD staff indicated they do not see behaviors in the classroom which affect Student, nor have they observed aggressive behaviors in the classroom. Ms. Martinez, who attended the IEP meeting on behalf of CARD, reported there was insufficient time during the IEP for her to present the 14 CARD behavior goals, however, a BIP was in place and she, Parents and Student's teacher agreed to discuss and implement the CARD goals outside of the IEP. The CARD goals were subsequently presented at the September 19, 2011 IEP meeting, and were approved by Parents.

66. Parents did not consent to the IEP. At the end of the IEP meeting, Parents, through their advocate, presented the team with a one-page, handwritten list of concerns and requests, most of which related to implementation of and reimbursements due under the terms of the Settlement Agreement. However, based upon discussion of the speech and language assessment, noting a possible auditory processing problem, Parents provided a written request for an assessment from an audiologist, a secondary auditory processing assessment, and a neurological assessment. Additionally, Parents requested a new program to develop Student's left-hemisphere with a microphone and headphone; implementation of Fast4Words through Lindamood-Bell, Floor Time, and a determination of the grade level of each goal. Of these requests, Ms. Mativa provided Parents with amended goals which added the approximate grade level of each goal.

*Parental Perceptions of the May 9, 2011 IEP:*

67. Mother distrusted the opinions of the District staff. She felt the District had misstated Student's progress on the goals. Many had been carried over year to year. The toileting goal and communication goals were not written into the IEP. She believed the PLOP's were incorrect and overstated. As example, she felt Student could not generalize as

reported. She strongly believed that Student had actually experienced a big regression and had gone into a downward spiral since being placed in the alternate program. Student was very aggressive outside of class and was attacking people.<sup>10</sup>

68. Mother complained of the manner in which the IEP meeting was conducted. She described the IEP meeting as “slam, bam, thank you mam.” The IEP team did not seek input from Parents. The District was very disrespectful to Parents and “shut them down.” They minimized and edited parental concerns, such as Student ripping off her fingernails and toenails or assaulting strangers in public.<sup>11</sup>

69. Mother further complained that the IEP meeting was very much disorganized and Mr. Gordon, the Principal, did not know what he was doing; he could not make decisions or answer questions. The draft IEP was given to Parents at the beginning of the IEP meeting, and handwritten changes and notes were added. She did not believe the District ever changed a goal from the draft. Mother was never asked if she understood the goals or felt the goals were appropriate. Although Mother is a highly educated and articulate woman, she felt “one needed to be a special education teacher in order to understand the goals.” Mother further indicated that, by the end of the IEP meeting, Parents were not informed the IEP was not complete, even though CARD had been unable to present its goals.

70. Parents requested Student be removed from Cottonwood and placed at Beacon. Student’s behaviors had increased. As described by Mother, “She was a monster.” Student’s anxiety increased. Student did not want to be at Cottonwood; she cried and acted out. Mother claims they (Parents) were shut down and the IEP team refused to discuss changing the placement. Beacon was not on the SELPA list and was too far away.

71. Parents considered the OT services presented in the IEP document to be vague and incomplete. The IEP simply indicates that Student will receive 30 minutes, 10 times per year. It does not indicate whether such OT service shall be individual, consultative, collaborative, or clinical. Ms. Penwarden explained that the Gallagher assessment had concluded that Student did not require educational OT. Ms. Penwarden felt Student still required OT consultation to assist with Student’s behaviors, as she did not know the sensory training of the CARD aides. She wanted to stay on the case on an as needed basis. While

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<sup>10</sup> It is noted that Student moved into evidence a series of exhibits consisting of e-mail communications, Daily logs, data collection sheets, and other documents which substantiate parental contentions of Student’s behaviors. Student’s attorney, however, failed to catalog or number the myriad of documents submitted, thereby making it overly burdensome, if not impossible to report on each and every document. A quick review of these documents, however, reveal that Parents indeed had reason for concern regarding Student’s behaviors.

<sup>11</sup> Mother also spent a great deal of time describing the shortcoming of the Settlement Agreement implementation and the CDE Compliance Complaint. While not relevant to the issues in this matter, the testimony clearly explained Mother’s distrust and animosity toward the District.

she was not involved in developing the CARD goals, she would consult with CARD about sensory related behaviors, such as water play and putting things in the mouth. She developed several sensory diets for Student to assist her to remain or regain calm and she showed the CARD aides sensory exercises for Student.

72. Parents considered the communication goals unmeasurable and inappropriate. Specifically, Goal 17 indicated Student will demonstrate coordination of actions over three turns with no more than two prompts in four out of five opportunities. Goal 18, addressed increasing Student's ability to increase who/what questions with 80 percent accuracy with one verbal prompt. Goal 19 worked on Students ability to follow directions in structured activities with four critical elements with 80 percent accuracy in three/four sessions. Parent considers the measurement of three/four sessions to be vague, as it fails to clarify whether it means consecutive times or otherwise. Goal 20, addresses Student need to initiate using questions with three verbal prompts with 70 percent accuracy. As Mother correctly pointed out, none of these goals contain short term objectives on which to base Student's progress throughout the year.

73. In response, Ms. Solomon disagreed with Parent's contention regarding the goals. She indicated that she had implemented the communication goals successfully and each goal was appropriate for Student. Further she collected data on all of Student's communication goals, and Student had made progress on each of them.

74. On July 14, 2011, the District's Director of Special Education, Ms. Wolter, sent Parents a Prior Written Notice (PWN) stating the District was "once again" denying Parents request for Student's placement at Beacon. The PWN indicated that the IEP team considered several placement options for Student, including but not limited to, placement in a county-based program, placement in various non-public school settings, and placement in various District programs. In the end, the IEP team determined that Student's educational needs could be met in a District program, specifically, the third through fifth grade classroom at Cottonwood. The District continued to believe the alternative program was appropriate to meet Student's unique needs in the least restrictive environment.

*September 19, 2011 Addendum IEP meeting:*

75. Donna Wolter, testified regarding the IEP amendment meeting was held on September 19, 2013. Ms. Wolter had previously taught Student in preschool and observed Student at Cottonwood at least once a month.

76. Parents were present at the IEP meeting and waived the presence of the SLP and OT therapist. The purpose of this meeting was twofold: (1) to discuss Parents' request for placement at Beacon; and (2) to present the CARD behavior goals which were not presented at the May 9, 2011 IEP meeting.

77. Parents again repeated their concerns that Student was becoming more aggressive both at home and at school, exhibiting maladaptive behaviors such as screaming,

pinching and punching. Parents continued to express that such escalations began when Student was placed in the alternative program. Parent conveyed concern that the school work was too advanced for Student, and Student was now using an alternate curriculum. Ms. Wolter noted at hearing that the District had initially tried the fourth grade curriculum at Parents' request. Of great concern was Student's hair pulling. Student now possessed a one-inch bald spot on her scalp, and had pulled out all of her eyelashes. In consideration of all of these issues, Parents again requested Student's placement at Beacon. Ms. Wolter sensed it was Parents belief that Beacon was the only placement in which Student could be successful.

78. The IEP team disagreed with Parents. Ms. Mativa reported that when Student was introduced to the fourth grade curriculum, she was not successful, but once using the alternate curriculum, Student was showing success in academic areas. Student was working at the kindergarten-first grade level, and although Student remained prompt-dependent, Student had become much more independent. Both CARD and the teacher reported that prompting was less invasive than the previous year. The CARD supervisor acknowledged Student's aggressive behaviors, but indicated that strategies were in place to redirect Student to appropriate behaviors. Further, all behaviors were documented by the CARD aide. Additionally, Student was being mainstreamed for music, lunch, and playground activities. The IEP team concluded that placement at Cottonwood remained appropriate for Student. Cottonwood was Student's home school; Student could be served there, and her IEP implemented there. Cottonwood provided a rich language embedded program. Student had access to sensory programs. Further, placement elsewhere would be more restrictive. Parents continued to disagree with the placement.

79. The September 19, 2011 IEP meeting also covered the behavior goals created by CARD prepared for the May 9, 2011 IEP meeting. CARD created six language goals, two cognition goals, two academics goals, and one goal each in academic functioning, adaptive skills (toileting), social skills and classroom behavior. Parents consented to the CARD goals.

80. On October 3, 2011, Ms. Wolter again provided Parents with PWN denying their request to place Student at Beacon. This notice was similar to the July letter, however, this time it included as "other relevant factors" that Student could be served at a school within the District, and would not be subject to an extensive bus ride. The distance from Student's home to Beacon is approximately 48 miles each direction. Further, Student would be traveling during high traffic time, resulting in a minimum of 50 minutes or more, each direction, depending on traffic.

*Post May 2011 IEP Behaviors:*

81. CARD continued to provide Quarterly Reports regarding Student's behaviors. The Quarterly Reports follow the same format and provide the same definitions as provided in Factual Findings 25, 26, and 27. The Quarterly Report for July 1, 2011 through September 30, 2011, reported that Student's noncompliance was reduced considerably by the end of September; Student's body SSB increased slightly; her vocal SSB increased more

significantly; and her visual SSB increased as well. Student's incidents of aggression, defined as scratching, pinching, grabbing the neck of another person and squeezing; and hitting with an open or closed fist, initially increased in August, but dramatically abated by the end of September. Further, CARD determined the function of Student's aggression was for attention and/or access to tangibles. Student continued to need close supervision during toileting to prevent dunking.

82. CARD's Quarterly Report for October 1, 2011 through December 31, 2011, reported that Student's noncompliance had continued to ebb and CARD stopped tracking noncompliance in November, due to its reduced occurrence. Though still measurable, Student's body SSB continued to lessen. Incidents of vocal SSB, however, increased over the period. Student's visual SSB lessened dramatically. During this time frame, CARD also began measuring Student's relatively new behavior of finger manipulation, which CARD sought to extinguish through sensory extinction and redirection.

83. CARD's Quarterly Report for January 1, 2012 through March 31, 2012, noted a marginal increase in body SSB; an increase then decrease in both vocal and visual SSB's. Student's incidents of finger manipulations initially increased and then reduced slightly. For the period of April 1, 2012 through June 30, 2012, the CARD Quarterly Reports indicated that Student's behaviors began to increase in all tracked areas. Further CARD reported that Student's aggression towards peers had re-emerged, and she needed to be closely monitored around the school campus. It is noted, however, that the June 30, 2012 report was not available to the May 8, 2012 IEP team.

84. Ms. Martinez acknowledged that not all of Student's behaviors were included on the Quarterly Reports; some behaviors were infrequent; some were not being measured; and some were still being identified.

85. Ms. Martinez noted that Student's aggressive behaviors increased during the 2011 summer. As of November 2011, however, Student's aggression and non-compliance had significantly decreased to the extent that Student no longer required tracking of those behaviors. Often, as one behavior was extinguished, Student developed a new behavior in its place, such as finger manipulations.

86. CARD did not formally track aggression in 2011, as these behaviors did not occur frequently until March 2012. Ms. Martinez did note that in January 2012, Student began pulling her hair, a behavior which primarily occurred at home. Further, the hair pulling decreased to the point CARD ceased tracking it as of March 2012.

87. As reported in 2011, Student's 2012 behaviors increased during school breaks, summer, and unstructured times. Additionally, increases or intensive behaviors often coincided with new things or visitors in the classroom. Goals which were not met were carried over and modified to Student's current PLOP's. New goals were developed based on Student's progress. Ms. Martinez emphasized that even when Student meets her goals, she continues to have deficits.

88. In March 2012, Mother observed Student's classroom. Student was off by herself with her aide and Ms. Campbell, segregated from the other students. One of the other students was raging and shouting profanities. His behavior continued for approximately 45 minutes. No one removed him from the classroom. Another child was also screaming. Mother emphasized her belief "every single one of Student's behaviors had been picked up from those kids." The classroom was so loud that Ms. Campbell apologized for the noise, and indicated she would never want her own autistic child in this class. Mother firmly believed that any advances made by CARD at home, were derailed at school.

89. Ms. Martinez did report that although she did observe other students shout in Ms. Mativa's classroom, she did not find the classroom to be exceptionally loud. Further, Student did not imitate other student's behaviors. Student did not pay attention to their outbursts, nor did she engage in profanity.

90. Ms. Martinez also commented on the District's cooperation with CARD. The BIP created by CARD was part of Student's school program. Ms. Mativa, Ms. Campbell, and Ms. Solomon attended the CARD clinic meeting, which were usually held on the Cottonwood campus. The purpose of the clinic meetings was to touch base, discuss new behaviors and needs, and update and modify the BIP as needed. It was time for everyone to get on the same page. Ms. Martinez reported there was interaction and collaboration between CARD and the District staff. The District was aware of the CARD interventions, and used those interventions as instructed by CARD. The District did not impede the CARD program.

91. Ms. Martinez concluded her testimony by supporting the IEP team. She believes Student made progress at school. She described Student as less prompt dependent and more independent. Student had a full range of supports, including visual supports, a token board, fidgets, access to the OT lab, music in the classroom and lots of positive supports. Based upon her observations and the data collected by CARD, Ms. Martinez found the alternate program an appropriate placement for Student, in which she made appropriate progress.

92. Amy Basye, a Senior Therapist for CARD also testified at hearing. Ms. Basye was under subpoena by Student, and was cooperative at hearing. In June 2011, Ms. Basye acted as Student's ABA home therapist, and in September 2011, she became one of Student's shadow aides at school. As a shadow aide, she accompanied Student for half of the school day to assist with Student's behaviors, social interaction, and completing assignments. Ms. Basye worked as Student's aide in the afternoon, another aide worked with Student for one-half day in the mornings. Ms. Basye also rode the bus home with Student in the afternoon. Ms. Basye worked on Student's academics with her both at home and at school. She is not a credentialed teacher. CARD created and implemented BIP's to work on Student's behaviors.

93. Similar to Ms. Martinez, Ms. Basye acknowledged that the classroom at Cottonwood was loud at times, and the other students had maladaptive behaviors. There was occasional screaming and profanity. Ms. Basye was aware that Parents were concerned

about Student's increasing behaviors and imitation of bad behaviors. Parents believed Student was being distracted from her work and learning. Ms. Basye disagreed, and did not believe Student's aggressive behaviors increased. Rather, she believes the behaviors remained at the same level. Further, certain behaviors occurred at specific times of the year. As example, the majority of Student's hair pulling took place during a specific time period. It was not continuous. The reports of Student's screaming were correct, however, they were on the rise only in the second half of the school year. Student's dunking incidents were occasional. Student exhibited no maladaptive behaviors on the bus ride home.

94. Ms. Basye concluded by opining that Student did not regress in the Cottonwood program. To the contrary, she felt Student was progressing in both behavior and academics. Student was not only instructed in a 1:1 setting, but also in class as part of the group. Lastly, Ms. Basye reminds us that maladaptive behaviors are part of Student's disability.

*May 8, 2012 IEP:*

95. The District held Student's 2012 annual IEP meeting on May 8, 2012, to craft Student's special education program for the 2012 ESY, and the 2012-2013 school year. All required parties attended the IEP. Additionally, both Parents and the District had lawyered up for this meeting.

96. The IEP team reviewed Student's progress on her 2011 goals. Of 11 goals reported, Student had met six of them, and partially met four. Only Student's writing goal remained "not met."

97. The PLOP's reported that academically, Student was currently working on the second grade level. Her reading skills were progressing, however, she still struggled recalling information after reading an entire story. Student was able to write simple sentences independently, but she needed assistance for the content of her writing and correct structure of more complex sentences. She still struggled with distinguishing between sentences and questions, and using correct punctuation. In math, Student was working on double digit addition with no regrouping using manipulatives.

98. Student's communication PLOP's reported growth in her ability to produce language with less prompting. The amount of Student's prompting had been gradually faded, and Student now only required single prompts. Student was able to respond and initiate social greetings with less direct prompts; was increasingly producing eye contact; and was able to participate in turn taking exchanges during a game of Go Fish with both peers and the SLP. Although Student is a strong rote learner, she continued to struggle with basic concepts which affect her ability to follow directions, and she will need as much opportunity to apply what she learns across settings and partners in order to facilitate generalization.

99. With regard to gross motor development, Student was able to access all playground equipment, and knew how to jump, hop, gallop and perform jumping jacks in a series. Student's fine motor skills were reported. Student had a functional writing grasp, could open food containers, manipulate snaps and buttons, and tie shoes. Visually, Student could cut on a line, adjust her letter size to space, and copy written work.

100. It was noted that Student needed to be supervised around scissors as she would cut her hair. She also needed close supervision around any water, such as toilets or puddles. It was reported that Student pinched other peers and adults, which CARD defined as attention seeking. Further, Student would scream, swipe things off her desk, or pull her hair during difficult tasks or attention seeking.

101. Student was able to follow routines and transitions within the classroom with minimal prompts. She was able to participate in small group instruction with appropriate accommodations. It was noted that Student worked well individually or in a group setting.

102. Adaptively, Student was able to tie her own shoes, feed herself, open packages with minimal support, and retrieve and put away supplies needed throughout the day. Student had an 83 percent accuracy rate on toileting, but still required close supervision on her toileting routine to avoid dunking in the toilet.

103. The IEP team created eight goals for Student in the areas of reading comprehension, writing, math, comprehension, communication (two goals), toileting, and behavior. CARD offered an additional 11 goals in the areas of cognition, social cognition, language, social skills, and executive functioning.

104. To support these goals, the IEP team offered SAI in a separate classroom for the school day; 45 minutes twice per week, a total of 90 minutes per week, consisting of a combination of individual and group speech and language service, as appropriate; behavior intervention services (1:1 shadow aide) from CARD the entire school day; 15 hours per week of CARD services in Student's home; and SAI for ESY 2012, including daily CARD behavior intervention services. The DIS also included up to ten 30-minute OT consultations on sensory needs, as needed.

105. Student's accommodations included an iPad, use of visual manipulatives, and movement breaks to be incorporated into her school day. The IEP team also proposed an augmentative communication (AC) assessment. The AC assessment plan was prepared and signed by Parents on May 8, 2012.

106. In order to implement the proposed IEP, the team made a formal offer of the alternate program in self contained SDC at Canyon Lake for the 2012-2013 school year. The class would be limited to eight students, and the teacher would possess a special education (moderate/severe) credential.



107. Preston Perez, the Principal at Canyon Lake, attended the May 2012 IEP meeting, and testified as to the IEP discussions regarding the proposed Canyon Lake alternate program. Although the program would be new to the Canyon Lake campus, it was an extension of the Cottonwood program, only designed for middle school students. The alternate program class would be smaller than all other classes at Canyon Lake and would contain no more than eight students. The class would have a properly trained teacher and a high adult to student ratio. Student would continue to have her 1:1 aide at Canyon Lake. Parents were informed that the Canyon Lake class would be equipped with a motor room, and all aides and the teacher would be trained in sensory strategies. Student would have access to OT, and OT lab, along with speech and language on the campus.

108. Greg Cleave attended the May 8, 2012 IEP as the District's Program Specialist. Mr. Cleave has a special education teaching credential (mild/moderate) and Administrative Services credential. He has also been a middle school SDC teacher. Mr. Cleave recalls Parents attended the IEP meeting with their attorney, Mr. Lewis. Parents initially participated in the IEP meeting, then stopped. At no time were they prevented from participating, and they were given opportunities to participate.

109. The Canyon Lake placement was discussed at the IEP meeting. As of May 2012, the middle school alternative program class was a new program for the middle school, and was still in the planning stage; it would not physically exist until the beginning of the 2012-2013 school year. Therefore, although Parents wanted to observe the "classroom," they could only observe the school site.

110. Additionally, on April 25, 2012, Mr. Cleave visited Beacon, and took a one hour tour of the school. His visit was exploratory in nature, and was intended to gain information about Beacon in general. He shared his observations with the District's special education team.

111. Mr. Cleave did not believe Beacon was appropriate for Student for several reasons. As a school exclusively for autistic children, there are no typical peers at Beacon. Further, Student's IEP could not be implemented at Beacon. Additionally, from a practical standpoint, Beacon was a great distance from Student's home, and the bus ride could take hours in each direction. Mr. Cleave emphasized that his opinion of Beacon was not the real issue. It was not that Beacon was inappropriate, but rather, the District program was appropriate.

112. Parents did not consent to the IEP, and provided a written dissent which was attached to the IEP document. The objections were as follows: (1) the goals were read with no discussion; (2) the goals were misnumbered or out of sequence in the IEP document; (3) Student's PLOP's were inaccurate, and were developed by unidentified persons and unidentified records; (4) Student's behaviors regressed during the current IEP period; (5) the District failed to develop goals or strategies to address Student's behaviors or establish why these behaviors were occurring. Parents emphasized that Student had pulled out her hair, eyelashes, fingernails, and toenails; (6) Student failed to meet the vast majority of her goals

from her last IEP and addendums; (7) the proposed goals were vague and unmeasurable, as well as inappropriate for Student; (8) the District failed to develop an IEP which addressed Student's minimum educational needs.

113. The written dissent also noted that Parents disagreed with the last assessments in the area of speech and language, and the psychoeducational assessment. As a result, Parents were requesting a speech and language IEE and a psychoeducational IEE, to include assessment of Student's cognition, academic skills, behavior, and sensory integration needs.

*Parental Perceptions of the May 8, 2012 IEP:*

114. Mother again complained that the IEP meeting was disorganized. Copies of the draft IEP were not provided to Parents and the District had to spend time making copies for the meeting. Parents did not feel they were included in the IEP discussions. As a result, Parents provided the IEP team with their written dissent to the IEP team which was attached to the IEP document. Instead of discussing its contents, the District members simply said they would take Parents' concerns with them as they left. Admittedly, Parents presented their dissent at the end of the time scheduled for the meeting.

115. Mother did not agree with the PLOP's. Student was not working on a second grade level. Mother believes it would be generous to say Student was working on a first grade level. Student could not write a sentence without major prompting. Additionally, Student presented with lots of echolalia and perseveration. Student seldom communicated in sentences and instead used one to two words. Although Mother believed the CARD home program was appropriate, she believed Student's social/emotional PLOP's were incomplete regarding interaction. In the classroom, she believed Student was always isolated and segregated from the other students. She didn't work well in group settings. Student's behavior PLOP's were the most contested. According to Mother, Student was not a great role model; she did not follow directions; she was not compliant; and she did not adjust well.

116. Mother did not agree with the goal baselines for the non-CARD goals. Although Mother had previously indicated she did not understand the goals, it is clear from her testimony, that she understood what was to be accomplished in each of the goals. During direct examination, Mother presented articulate arguments regarding inaccurate baselines, the lack of definition of frequency and intensity for Student's performance on the goals. She took issue with how the District determined a goal was "met." Mother felt a goal is met at 100 percent, not at four out of five attempts, or other lesser amounts. Unfortunately, during cross examination, Mother became combative, and split hairs in responding to questions regarding the goals.

117. Although Ms. Mativa prepared Student's proposed academic goals, she did not attend the IEP meeting. She also developed Student's PLOP's, based upon her observations and testing. Her contributions to the IEP were pre-printed as part of the IEP draft. She considered each of the goals appropriate for Student.

118. Ms. Solomon attended the 2012 IEP meeting, and indicated that the Parents absolutely participated in the meeting. Parents were never told they could not ask questions, nor had she “ever heard of such a thing.” Ms. Penwarden considered the proposed OT consult appropriate for Student’s educational OT needs. It allowed the staff working with Student to come to her when they needed information on how to deal with Student’s sensory issues. Student’s attention had improved quite a bit in Ms. Mativa’s class, and Student did not require direct OT services. Further, she found that Student’s screaming and pinching were not sensory related. Her aggressive behaviors were not sensory related but were behaviorally geared toward task avoidance. Student had lots of anxiety issues which were non-sensory in nature. Student’s hair pulling was more of an obsessive compulsive behavior.

119. Ms. Solomon wrote Student’s communication PLOP’s. Although Student was developing increasing independence in language skills, she exhibited an area of need in the ability to understand concepts and answer questions. Again, in contrast to Parents, Ms. Solomon defended Student’s communication goals. Specifically, Goal Four addressed language comprehension and sought to have Student demonstrate understanding of basic concepts of sequence and order necessary for following directions with 80 percent accuracy in three out of five trials with no more than one prompt. Ms. Solomon described this goal as essential for functional living. It addresses imperative concepts which are implemented through functional activities. As example, the goal is worked on in the speech room, and then generalized in the classroom. Ms. Solomon indicates that the goal is measurable through data collection. Goal Five addresses Student’s area of need in responding to questions, and required Student to respond to auxiliary and who/what questions with 80 percent accuracy in three out of five trials during structured functional language activities when provided with no more than one prompt. Ms. Solomon indicated Student needed to develop consistency in responding to yes/no questions. Further, the goals were implemented, measurable and appropriate for Student. Goal Six addressed pragmatics, and sought Student to identify and describe behaviors associated with feelings, i.e., happy/sad, with 80 percent accuracy in three out of five trials with no more than one prompt. Again, Ms. Solomon considers this to be a critical goal, as many of Student’s behaviors are driven by her inability to express herself. Goal Seven relates to Student’s social/behavioral needs, and was designed to teach Student to use an appropriate method of gaining help or attention in four out of five situations as measured by teacher observation. Ms. Solomon conceded this was a high expectation for Student, but she could still work towards it. Ms. Solomon observed that Student’s attention span had increased and she could now function for 45 minutes at a time. As a result, she recommended Student’s speech and language DIS be changed from 30 minutes, three times a week, to 45 minutes, twice a week.

120. Additionally, Ms. Solomon acknowledged that the CARD goals, which Parents approved, also addressed communication. The CARD staff was an active partner in the classroom and during the IEP meeting.

121. Ms. Solomon provides speech and language collaboration at Canyon Lake. She described the alternate program, as a language based class with emphasis on social skills. She opines the Canyon Lake program was appropriate for Student. The class, made up of

sixth through eighth grade students is age appropriate for Student. The class is extremely structured with a good ratio of adults to students. The alternate program at Canyon Lake would have met Student's individual needs and provided her with social based activities with typical peers, through reverse mainstreaming into the classroom. The educational setting at Canyon Lake would meet Student's needs as it is a language rich environment, with lots of repetition.

122. Ms. Martinez did not share Parent's perspective regarding the May 8, 2012 IEP meeting either. Ms. Martinez indicated that Parents participated in an open discussion on Student's completion and progress on goals. They discussed Student's behaviors and the need for continuing support from CARD. Ms. Martinez made the recommendation to increase CARD services during the 2012 ESY, and the IEP team agreed to do so. Parents consented to all of the CARD goals. All in all, she believed Student's behavior program was comprehensive and appropriate.

123. Ms. Martinez acknowledged that in May 2012, Student's behaviors were increasing and new behaviors were forming. CARD did not discuss this information on May 8. Ms. Martinez opined that changes in Student's activities could have led to the changes in behavior, such as new teachers or graduation. She also reported, that although Student did not attend 2012 ESY, Student's home services continued throughout the summer.

*The Beginning of the End:*

124. On June 12, 2012, Parents provided the District with a written Notice of Unilateral Placement. Specifically, Parents intended to place Student in a non-public school due to the District's failure to provide Student a FAPE. Parent's also indicated they fully expected the District to pay for this placement as well as any DIS required.

125. On June 20, 2012, after receiving Parents Notice to Unilaterally Place, the District called for another IEP meeting. The District provided Parents with three choices of dates; July 9, July 10, and July 11, 2012. On July 9, 2012, Father e-mailed the District and indicated that he regretted to inform you (the District) that we (Parents) were sorry that the District could not provide a mutually agreeable time and place for an IEP meeting. Parents further stated that Parents did not agree to any IEP without their attendance. On July 12, 2012, Mr. Cleave wrote Parents indicating that they (Parents) had been given several dates and times as options for an IEP meeting, and in addition were given the opportunity to provide their own suggestion for a day and time for the IEP meeting. Mr. Cleave further explained that the meeting was mandatory and must be held. The District further encouraged Parents' attendance and cooperation. If Parents did not respond with a date and time for the IEP meeting, however, the meeting would be held on July 20, 2012 without your (Parents) presence. Parents did not respond, and as described by Ms. Wolter, "they had already crossed the Rubicon when they enrolled Student at Beacon." The IEP meeting however, was not held until July 31, 2012.

*July 31, 2011 IEP Addendum Meeting:*

126. On July 31, 2012, the District held a one-half hour IEP meeting in Ms. Wolter's office. The IEP team consisted of Mr. Perez, Ms. Mativa, Ms. Wolter, and Mr. Cleave. Parents were not present. At the request of Ms. Mativa, the IEP team discussed and developed two new goals in the area of reading comprehension and social greetings. The team discussed Parents' decision to unilaterally place Student in a NPS, and further determined to maintain their offer of placement at Canyon Lakes.

127. The IEP team also discussed Student's continued behavior concerns. Historically, Student's maladaptive behaviors had been addressed through the services of a 1:1 behavioral aide provided by CARD. The IEP team determined that the behavioral approaches (presented by CARD) and included in Student's IEP were now proving to be ineffective. Based upon Student's aggressive behaviors which began increasing in March 2012, and continued to escalate until the end of the school year, Ms. Wolter indicated it was time to consider new or different behavior modifications. Therefore, the District recommended a FAA for Student, and would use an assessor other than CARD. Upon completion of the FAA, the IEP team would meet to determine whether additional behavioral supports, such as a Behavior Intervention Plan, were needed to address Student's unique needs. The District sent Parents a copy of the July 31, 2012 IEP Addendum and Assessment Plan for the FAA. On August 17, 2012, Ms. Wolter sent CARD a letter advising CARD to continue providing Student home services, supervision and clinic pursuant to the May 2011 IEP, regardless of Student's attendance at school.

128. Parents did not respond, and Student has attended Beacon since the beginning of the 2012-2013 school year.

*Student's Expert, Dr. Robin Morris:*

129. Student offered the testimony and expertise of Dr. Robin Morris to support her contentions.<sup>12</sup> Parents initially contacted Dr. Morris in May 2012, seeking an assessment of Student. Parents reported that Student's maladaptive behaviors were increasing and she was exhibiting a lack of academic progress. Parents reported that Student was in the fifth grade, yet she was performing at the level of a kindergartener/first grader. Further Parents indicated that Student was developing new, inappropriate behaviors, including pulling her hair out, tearing her toenails and fingernails until they bled, gauging herself, pinching others hard, putting her knees and feet in the toilet, swiping objects off the table and breaking them, as

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<sup>12</sup> In addition to her B.A., Dr. Morris holds an M.A. in clinical psychology, a Psy.D., and a G.A.C.T.A.B.A (Behavior Analysis). Her clinical practice involves therapy with high risk infants and children. Over 70 percent of her practice involves autism. She provides individual therapy, and neurological and psychological assessments, particularly in the area of autism and learning disabilities. She creates behavior treatment plans for children, offers parent training using behavioral concepts, and conducts preference assessments and Functional Behavioral Assessments (FBA).

well as screaming. Parents reported that Student's CARD aide and teachers were having difficulty finding the antecedents for these behaviors. As a result of Student's increased anxiety, Parents began taking Student to a psychiatrist, who she now sees on a regular basis. The psychiatrist indicated that Student was suffering from a considerably high level of stress and anxiety. Parents also indicated that Student had started to present with safety issues, primarily elopement. Student would also bite objects such as tables and desks, and also exhibited temper tantrums. Parents reported that Student also exhibited significant deficits in speech and engaged in echolalia. Dr. Morris assessed and observed Student which resulted in her written assessment report dated June 17, 2012.

130. Dr. Morris reviewed Student's records going back to 2004. Dr. Patterson's 2010 Psychoeducational Report and Student's May 8, 2012 IEP were thoroughly reviewed. Dr. Morris interviewed Ms. Campbell (Student's substitute teacher in 2012), Ms. Mativa (Student's teacher), Dr. Staria Manos (Student's holistic doctor), and Ms. Martinez (Student's CARD supervisor). Ms. Campbell reported Student's comprehension was an area of weakness. She had difficulty answering "who/what" questions, but had strengths in math, having started to solve two-digit addition without regrouping and manipulatives. With regard to language, Student could sometimes get her needs met verbally, sometimes not. Of note, it was difficult to tell what types of things upset Student. Ms. Campbell further indicated Student did not engage with her peers, would not initiate play with other students, and required support from her 1:1 aide. Ms. Mativa, who was interviewed on May 17, 2012 reported that Student had grown academically and had made progress over the prior five months. Student tended to work by herself with her aide and Ms. Campbell. Student's academic instruction was primarily 1:1. She also noted, however, that Student had started to engage in cutting her hair. Student had previously pulled out her hair, however, this behavior had been extinguished, and was now replaced with the new behavior of cutting her hair. Student's pinching had also begun to increase, and was described by Ms. Mativa as "attention seeking." Lastly, Student would engage in screaming out of the blue.

131. Ms. Martinez provided Dr. Morris with little information regarding Student's CARD program at both home and school. Of note, Ms. Martinez reported that Student was starting to use full sentences to make requests and had met some of her goals. In regards to behavior, Student was noted to have a history of pinching. The pinching decreased during the school year, but Student had developed a sharp increase in new behaviors that are considered troublesome, including swiping, screaming, choking herself by putting things in her mouth, putting her fingers down her pants and smelling her fingers, pulling her hair out, and picking at her nails. Ms. Martinez reported that for many of those behaviors, there is no clear function. Ms. Martinez also confirmed that she had observed behavior outbursts from other student in Student's classroom.

132. Dr. Morris observed Student at Cottonwood in May 2012, and was accompanied by Mother. When initially observed, Student was attending an assembly. Student was in the back of the auditorium with her aide and Ms. Campbell. Student did not sit with her classmates due to her propensity to pinch. Student was noted to have visible shaking of her upper body while other students performed on stage. At that time Mother

took Student's hand and held it. Mother also directly participated in redirecting Student's behavior during the assembly. After about 15 minutes Student was removed from the assembly due to her behaviors and returned to the classroom, where she was the only student in class. Student then received 2:1 instruction from Ms. Campbell and the aide. Student was able to work from a book and focus on the lesson. She read a story from an iPad, and was noted to be calmer than in the assembly. It is also noted that when Student saw her Mother in the classroom, she began to perseverate on swimming, and continued doing so until her classmates returned and they transitioned to recess. At recess, Student repeatedly asked her aide and Mother, who was again present, albeit standing a significant distance away, about going to the pool. When the aide attempted to have Student stand in line with others, she pinched a peer, and was again removed.

133. Dr. Morris also observed Student in her office. She administered comprehensive standardized testing, measuring Student's cognitive skills, behavior, adaptive living skills, academic abilities, language abilities, and motor and social skills.

134. The assessment was not without difficulties as Student began exhibiting maladaptive behaviors within minutes of commencing the assessment. Student tore a hole in her shirt, and within minutes was naked on her upper body. Dr. Morris noted that Student was hypervigilant toward her surroundings, and her behavior was impulsive and unpredictable with no identifiable antecedents. At one point, Student appeared to be cheerful and smiling, but then, out of nowhere, turned the entire table on top of Dr. Morris, knocking her backwards to the floor. As Dr. Morris remained on the floor with the table on top of her, Student sat expressionless, staring out the window. At other times, Student would perseverate about swimming, shout for no apparent reason, hum, grind her teeth, and tense her body to the point of trembling. While Dr. Morris considers her testing a valid representation of Student's current levels, she indicated that Student's behaviors during the testing could affect Student's ability to access the information.

135. Dr. Morris administered appropriate standardized tests and rating scales. Without reciting each test and each score, which can be found in Dr. Morris' report itself, a recap of her findings is as follows:

136. Student's overall level of intellectual functions is classified as Moderately Delayed, with Working Memory as Student's poorest area of performance. Dr. Morris reported, however, that Student's current scores are likely an underestimate of her abilities due to her poor attention and anxiety.

137. Student's foundational language abilities showed various levels of development. Student showed difficulty comprehending verbal messages which were semantically complex or multi-stepped. Dr. Morris strongly opined that Student's academic performance was affected by her lack of understanding of negation and special concepts. Further, when directs or tasks become multifaceted or require a high level of independent skills, Student cannot focus on one part of the task or see the whole picture, resulting in her

missing what is being said, and becoming cognitively inflexible. Dr. Morris also found significant deficits in the area of Student's expressive and receptive abilities.

138. Student's fine motor abilities were found to be similar to a 6.0 year old, and she scored below the expected level in the area of visuomotor integration. Student's deficits in social skills were significant and were reported by all parties. While Student appeared indifferent to her peers, she was very aware of the adults in her school setting.

139. Student's adaptive living skills were found to be significantly impaired. Student's Broad Independence, an overall measure of Student's adaptive behavior, is comparable to that of a 4.2 year old. Her functional independence is rated limited to very limited. When presented with age-level tasks, Student's motor skills are limited; personal living skills are limited to very limited; and social interaction and communication skills and community living skills are very limited. Student has limitations in 13 adaptive skill areas, including toileting, dressing, and personal self-care. Student's greatest strengths included her motor skills, with her lowest score in community living skills. Overall, Student demonstrates serious problem behaviors. She demonstrates both serious internalized and externalized maladaptive behaviors. As a result, Student will need extensive support, much more than others her age, because of limited to very limited adaptive behaviors and because of problem behaviors.

140. Dr. Morris found Student's behavior consistent across settings. Student required prompts to maintain attention and to complete tasks. In multiple settings, Student was anxious and exhibited off-task behavior. Admittedly, the classroom/school setting in which Dr. Morris observed Student, was not typical of Student's school day.

141. Based upon her assessment of Student, Dr. Morris concluded that: "At the current time it is very important Student's behaviors be actively addressed, decreasing her anxiety and off-task behavior. Student needs to be in a classroom with a trained aide who will not only work on group goals, but address individual goals. Student presents in a unique way, as she is eager to learn but her strategies for learning concepts differ depending on the preference level and type of task presented. Student is able to imitate peers and adults, but often requires adult facilitation. Dr. Morris further opined, "It is with certainty [the examiner] believes Student's skills she has learned are largely due to the skilled instruction she has received from her 1:1 CARD aide and the supports her parents have given reinforcing those skills." Dr. Morris also credited Ms. Campbell's calming nature and ability to offer Student an individualized approach.

142. Ultimately Dr. Morris concluded that Student learns well and is highly motivated when information is presented repeatedly and coupled with reinforcements. Student can learn new skills when taught using techniques commonly found in ABA. Dr. Morris found it critical that Student continue to receive 1:1 behavior therapy that addresses health concerns, academics, and behavioral difficulties that prevent her from fully accessing her school environment.



*Dr. Morris's Recommendations:*

143. Dr. Morris's written report contained significant information and recommendations. Unfortunately, her report was not completed or presented to the IEP team in time for Student's May 8, 2012 IEP meeting. Nonetheless, based upon her findings of Student's current needs and goals, Dr. Morris recommended:

1. Student required a small, language-based classroom that focuses on academics and functional skills. That classroom should have children without severe behaviors and should have highly trained aides for classroom support and redirection. Student continues to require the support of a highly trained 1:1 aide for the entire school day. At the current time it is not thought that Student requires the direct 1:1 academic support from the teacher if the classroom offers ample opportunity for direct instruction from a teacher. Dr. Morris strongly recommended that Student be placed in a classroom with appropriate social models. She should also continue to have home consultation through her school program as well as have a program that consults with outside agencies working with her.

2. Dr. Morris found that Student's behavior excesses have increased and new ones have emerged. Many of the behaviors are currently thought to be anxiety related. With this in mind, Dr. Morris recommended a positive behavioral support and intervention plan be built into Student's school day program by offering opportunities to lower Student's level of anxiety when heightened.

3. Finding a lack of progress in some academic areas, Dr. Morris recommended Student continue to receive a home program consisting of 15 hours per week through an agency with aides who have the appropriate level of training and supervision (CARD).

4. It was recommended that Student's academic and behavior goals be written by Student's teacher, Mother and CARD supervisor, to provide continuity of care. Student's 1:1 aide should take ongoing data regarding the goals set, and all data should be taken on a daily basis and shared with the IEP team and Parents on a regular basis. Changes to IEP goals should not be made without consideration of data. A monthly consultation with Student's IEP team, Parents, teacher, and CARD supervision was recommended to offer communication to all professionals working with Student.

5. Given Student's speech delays, (although she is not a SLP), Dr. Morris recommended individual speech services for Student to take place in four 30-minute sessions per week. An additional 60 minutes per week of consultation with the SLP was also recommended.

6. Dr. Morris also recommended Student continue to receive OT on a consultative basis.

7. It was recommended that Student develop a hobby or interest. Dr. Morris points out that there has been substantial research on music therapy, and a desire to listen to songs repeatedly makes a good medium for committing information to memory. In Student's case, music could be used as a social reinforcement. Dr. Morris recommended 60 minutes per week of music therapy.

8. Due to the severity of Student's anxiety, and her hair pulling, nail pulling and screaming, Dr. Morris recommended that medications be considered, and Student's trichotillomania (hair pulling) be monitored by a psychiatrist to oversee Student's current symptoms.

9. Lastly, due to the strong possibility of regression, Dr. Morris recommended that Student receive services 12 months out of the year, with no break exceeding two weeks in length.

*Additional Testimony from Dr. Morris:*

144. At hearing, Dr. Morris provided additional information to supplement her report and recommendations. On the subject of least restrictive environment, Dr. Morris acknowledged that typical peers are beneficial, but Student's awareness of other students is limited at this time. At the present time, Student needs precursor skills before typical peers will provide a benefit. The more Student's awareness grows, the more beneficial typical peers become.

145. Dr. Morris found CARD's collection data and analysis appropriate for Student, and noted that CARD was continually assessing and reassessing Student's behavior. Further, the CARD behavior goals presented as part of Student's May 9, 2012 IEP were appropriate. Oddly, she considered Student's behavior PLOP to be under reported. She opined that behaviors are multi-faceted and more than just attention seeking, as CARD had determined. Further, she did not believe Student's behaviors were being controlled in the District's placement, the same behaviors which were being addressed by CARD in the classroom.

146. Dr. Morris also supported Mother's contentions regarding the inadequacy of the IEP. She found that areas of Student's deficits, such as comprehension, self-direction and transition were not adequately reported in Student's PLOP's. While Dr. Morris acknowledged the IEP covered all areas of Student's need, ideally, she would have expanded the goals within those areas to meet Student's need. Further, Dr. Morris found the goals to be confusing. On some goals the baselines did not correlate to her assessment findings, and were unreasonably high based upon Student's abilities. On others, she found the baseline accurate, but the goal difficult to measure. Dr. Morris also felt that more goals were needed to address social interaction, self-direction and integrated play.

*Alternate Program at Canyon Lakes Middle School:*

147. Ms. Wolter was involved in the creation of the alternate program, also known as CHAPS, in January 2011. She considers it to be a unique program which utilizes a collaboration of services. CHAPS was designed for moderately disabled students, who required a smaller class, with a larger ratio of adults to students. Prior to 2012, the program existed only on the elementary school level, as there was no immediate need for the program at the middle school level. It was intended that the Cottonwood CHAPS students could feed into the alternate program at Canyon Lake as they aged into middle school. The plans for the extension of the Cottonwood program into Canyon Lake was “in the works” prior to Student’s May 9, 2012 IEP meeting, however, the exact classroom had not yet been physically set up, and a teacher had yet to be hired.

148. Ms. Wolter stated that the District fully discussed the alternative program with Parents at each of the 2011 and 2012 IEP meetings as well as previously at the settlement conference when Student was enrolled in the program. Further, the CHAPS program at Canyon Lake made sense. Student had already been in the alternate program for a year and one-half. The program was familiar to Student, and all of Student’s DIS could be continued at Canyon Lake. The Canyon Lake program mirrored the Cottonwood program, only with older students and a new location. Further, Ms. Wolter stressed that the program described to Parents at the May 8, 2012 IEP meeting was the same program which was implemented at Canyon Lake for the 2012-2013 school year.

149. Subsequent to the IEP meeting, Mother and Dr. Morris toured the Canyon Lake campus, accompanied by Dr. Perez. Mother was shown an SDC class, but was well aware that the SDC was not the placement being offered by the IEP team. In actuality, the District could not show Mother the actual alternate program classroom until the beginning of the school year, as the 2011-2012 classes were still in session. Mother and Dr. Morris considered the observation a waste of time. The existing SDC’s at Canyon Lake were not intended for Student, nor were they considered appropriate. Ms. Wolter believed that the observation would allow Mother to check out the layout of the campus and meet the service providers, most of whom already worked with Student.

150. On July 24, 2012, prior to commencement of the 2012-2013 school year, Rachel Cohn was selected as the classroom teacher for the Canyon Lake alternate program. Ms. Cohn has 10 years experience as a special education teacher in Massachusetts, and has obtained her preliminary provisional teaching credential in California for special education (moderate/severe).

151. The alternate program classroom has a ratio of four adults to five students, along with a deaf/hard of hearing (DHH) interpreter. There are other autistic students in the class, however each child has an individualized curriculum crafted pursuant to his/her IEP. Ms. Cohn works individually with each student. The classroom is equipped with a break area and calming area. Students are provided mainstreaming opportunities as Canyon Lake has general education classrooms. Additionally, the alternative program avails itself of

interaction with neurotypical peers through reverse mainstreaming (where general education students come into the alternative program class), lunch, electives, and assemblies.

152. Although Ms. Cohn did not attend Student's 2012 IEP's, she did review them prior to the commencement of the 2012-2013 school year, and opined that the IEP goals were appropriate for her classroom, and she could implement Student's proposed IEP.

*The Beacon School:*

153. Edward Miguel, a school administrator at Beacon, testified and described the Beacon educational experience. Beacon is a school for autistic children which services students from kindergarten to age 22. It is certified by the state of California as a non-public school (NPS), and has received state teaching awards. Beacon has a psychologist, behavior analyst and neuropsychologist on staff. Beacon employs seven teachers for five classrooms. All teachers have special education teaching credentials. No classroom has more than 12 students. The school utilizes ABA, and all aides are trained behavior interventionists, and Beacon can provide 1:1 aides when needed. As a school for autistic children, Beacon has no non-disabled or neurotypical peers. Additionally, Beacon is located in La Palma, California, which in normal Southern California traffic, can be nearly two hours (each way) from Student's home in Lake Elsinore.

## LEGAL CONCLUSIONS

*Burden of Proof:*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387], the party who files the request for due process has the burden of persuasion at the due process hearing. In this matter, Student has the burden of proof on all issues.

*Legal Authority for Decision:*

2. This special education administrative due process proceeding is brought under the authority of the Individuals with Disabilities Education Act (sometimes IDEA or Act). (See 20 U.S.C. § 1400 et seq.) The primary goal of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education or FAPE that emphasizes public education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*).)

3. The IDEA seeks to make public education available to handicapped children who were previously excluded from any form of public education. (*Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458, U.S. 176, 191-92 [102 S. Ct. 3034, 73 L. Ed.2d 690] (1982) (*Rowley*).) In particular, the IDEA aims to address concerns about the "apparently

widespread practice of relegating handicapped children to private institutions or warehousing them in special education classes.” (*N.D. v. Haw. Dept of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1115 (citing *Sch. Comm. of the Town of Burlington v. Mass. Dept. of Educ.* (1985) 471 U.S. 359, 373. [105 S. Ct. 1996, 85 L.Ed.2d 385].) On the other hand, the IDEA aims to ensure that handicapped children are provided public education appropriate for their needs, and are not “left to fend for themselves in classrooms designed for education of their non-handicapped peers.” (*Rowley, supra*, 458 U.S. at p. 191.)

4. In *Rowley*, the Supreme Court determined that, in enacting the IDEA, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Rowley, supra*, 458 U.S. at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the disabled child’s IEP, then the assumption is that the child’s program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a “basic floor of opportunity.” (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a “potential-maximizing education.” (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that “confers some educational benefit upon the handicapped child.” (*Id.* at p. 200.)

5. The Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

#### *Elements of FAPE:*

6. Under the IDEA, a free appropriate public education or FAPE is defined as special education and related services that (1) have been provided at public expense, under public supervision and direction, and without charge; (2) meet the school standards of the state educational agency; (3) include an appropriate pre-school, elementary school, or secondary school in the state involved; and (4) are provided in conformity with the individualized education program (IEP) required under section 1414(d) of the Act. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

7. The term “special education” means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) “Specially designed instruction” means the adaptation, as appropriate to the needs of the disabled child, the content, methodology or delivery of instruction to address the unique needs of the child that result from the child’s disability. (34 C.F.R. § 300.39(b)(3)(2006).) In the context of the IDEA, “special education” refers to the highly individualized educational needs of the particular student.

(*San Rafael Elementary v. California Education Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160.) The term “related services” means transportation and developmental, corrective or other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (2006).) In California, “related services” are called “designated instruction and services or “DIS.” (Ed. Code, § 56363, subd. (a).)

8. In terms of special education law, a “related service” is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) An educational agency, in formulating a special education program for a disabled pupil, is not required to furnish every special service necessary to maximize the child’s potential. (*Rowley*, *supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033 (Park).)

9. An IEP meets the Rowley standard and is substantively adequate if the plan is likely to produce progress, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2nd Cir. 2005) 430 F.3d 595, 598.) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child’s intellectual potential. (*R.E. v. New York City Dept. of Educ.* (S.D.N.Y. 2011) 785 F.Supp.2d 28, 42.) The focus must be on the placement of the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (Gregory K.).) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley*, *supra*, 458 U.S. at p. 197, fn. 21.) Instead, “(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program.” (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

#### *Procedural Issues:*

10. A state must comply both procedurally and substantively with the IDEA. (*Amanda J. v. Clark Cnty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 881 (*Amanda J.*).) While the IDEA does not define the particular substantive level of education that must be provided to a child, the state must provide an education that is “reasonably calculated to enable the child to receive educational benefits.” (*Rowley*, *supra*, 458 U.S. at pp. 206-07.)

11. The IDEA requires that a due process decision be based upon substantive grounds when determining whether a child has received a FAPE, unless a procedural violation impedes the child’s right to a FAPE, significantly impedes the parent’s opportunity to participate in the decision making process regarding the provision of a FAPE to their

child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley*, *supra*, 458 U.S. at 206-07.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (*W. G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F. 2d 1479, 1482.)

#### *Predetermination:*

12. Predetermination is a procedural violation which deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. Merely pre-writing proposed goals does not constitute predetermination. The test is whether the District comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made. (*Doyle v. Arlington County School Board* (E.D. VA 1992) 896 F.Supp. 1253, 1262, citing *Deal v. Hamilton County Board of Education* (6th Cir. 1993) 993 F. 2d 1031.)

#### *The IEP:*

13. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K.*, *supra*, 811 F.2d at p.1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*)

14. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b)(2006); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals including academic and functional goals designed to meet the child's needs that result from the child's disability. The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child's other educational needs that result from the child's disability (34 C.F.R. § 300.320(a)(2)(ii) (2006).)

#### *Parental Participation in IEP Process:*

15. The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and

information they provide regarding their child. (64 Fed.Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at p. 891.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F. 2d 1031,1036.) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann*, *supra*, 993 F.2d at p. 1036.) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133.)

16. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley*, *supra*, 458 U.S. at p. 207].)

17. In *Union School District v. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1526 (*Union*), the court emphasized the importance of the formal offer requirement. The formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placement were offered, and what additional educational assistance was offered to supplement a placement, if any. Further, in determining whether or not to accept or reject a placement, parents have the right to consider the entire offer. (*Student v. San Juan Unified School District* (SN01-02308) March 7, 2003.)

18. In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. However, that right does not mean that a change in the location of a program amounts to a change in placement, or that the district failed to make a clear, written offer of placement. The Department of Education's longstanding position is that "placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school." (71 Fed. Reg. 46687 (Aug. 14, 2006); see also *Johnson v. SEHO* (9th Cir. 202) 287 F.3d 1176.)



19. Although school districts should strive to follow IEP's as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. (*Van Duyn ex. rel. Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 821.)

20. Courts allow a school district to cure its procedural defects with a subsequent IEP team meeting. (*Vashon Island, supra*, 337 F.3d at p. 1136; *S.J. v. Issaquah School Dist. No. 411* (9th Cir. 2009) 326 Fed.Appx. 423, p. 3 [nonpub. opn.]; *J.W. v. Fresno Unified School Dist.* (E.D.Cal. 2009) 611 F.Supp.2d 1097, 1127-1128, *affd.* (9th Cir. 2010) 626 F.3d 431.)

#### *Behaviors:*

21. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) If an IEP team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd.(b)(1).) There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. (See Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit., 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *Escambia County Bd. of Educ. V. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

#### *Least Restrictive Environment (LRE):*

22. Federal and State law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily."

(20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1.) If it is determined that a child cannot be educated in the general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1050.) Education Code section 56360 requires that the special education local plan area must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code, § 56360; see also 34 C.F.R. § 300.115(a)(2006).)

*Reassessment:*

23. A public agency must ensure that a reevaluation of each child with a disability is conducted if (1) the public agency determines that the educational or related services, needs, including improved academic achievement and functional performance, of the child warrants a reevaluation;(2) or if the child's parent or teacher requests a reevaluation ( 34 C.F.R. § 300.303 in accordance with 34 C.F.R. § 300.311.) A reevaluation may not occur more than once a year, unless the parent and public agency agree otherwise, and must occur at least once every three years, unless the parent and public agency agree that a reevaluation is unnecessary. (34 C.F.R § 300.303(b)(2006).)

*Independent Educational Evaluation (IEE):*

24. When a parent disagrees with an assessment obtained by a school district, the parent has the right to an independent educational evaluation (IEE) from a qualified specialist at public expense unless the school district demonstrates at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329(b), (c), 56506 subd. (c); 34 C.F.R. § 300.502 (2006).) If a parent requests an IEE at public expense, a school district must, without unnecessary delay, either initiate a due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense, unless the school district demonstrates in a hearing that the assessment obtained by the parent did not meet educational agency criteria. (34 C.F.R. § 300.502(b)(2)(2006); *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. 2006) 2006 U.S. Dist. Lexis 90840; *Norton v. Orinda Union School Dist.* (9th Cir. 1999) 1999 U.S. App. Lexis 3121.)

*Prior Written Notice:*

25. A school district must provide written notice to the parents of a child before it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)(2006); Ed. Code, § 56500.4.) The notice shall include, among other things, a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; and a description of other options considered by the IEP team and the reason those options were

rejected. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b)(2006); Ed. Code, § 56500.4.) The comments to the federal regulation indicate that prior written notice shall be provided at a reasonable time before the school district implements the proposal or refusal that is the subject of the notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).)

#### *Remedies:*

26. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1996) 471 U.S. 359, 369-371 (Burlington); 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of IDEA.” (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

#### *Analysis of Issues:*

*Issue One: Did the District fail to provide Student a FAPE by failing to identify all areas of disability or suspected disability between January 25, 2011, and December 13, 2012?*

27. Student fails to address this issue in her Closing Argument Brief, no doubt with the recognition that the evidence does not support such a contention. California Education Code, section 56320, subdivision (f), requires that a student be assessed in all areas related to his/her suspected disability. Dr. Patterson conducted a Psychoeducational Assessment of Student in 2010, which was undisputed by both parties. The assessment was thorough, and at no time did Student raise a claim that the Patterson assessment failed to identify all of Student’s areas of disability. (Factual Findings 4 through 9) Even Student’s expert, Dr. Morris, acknowledged that the District’s IEP’s covered all areas of Student’s needs. (Factual Finding 146) Student failed to suggest any areas of suspected disability which remained unidentified. The District did not fail to provide Student a FAPE by failing to identify all areas of disability.

*Issue Two: Did the District fail to develop IEP goals for Student between January 25, 2011, and December 13, 2012, which were not vague, measurable and appropriate for Student?*

28. Parents consented to every goal created and presented by CARD, and therefore the behavior goals are not at issue. At hearing, Student voiced dissatisfaction with almost every goal proposed by the District, whether it be disagreement with baselines, measurement, means of implementation or just plain semantics. As many of the criticisms are the same for multiple goals, they will not be discussed individually, but the findings herein apply to each of the goals.

29. Analysis of Student's contentions under *Union* bears merit. In *Union*, the court emphasized the importance of the formal offer requirement. The formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placement were offered, and what additional educational assistance was offered to supplement a placement, if any. (Legal Conclusion 16.)

30. At best, the IEP team was extremely sloppy in drafting Student's May 9, 2011 IEP. The "OT services" is the glaring example of shoddy preparation. The OT service description contains no definition of *what* OT service will be provided for 30 minutes, 10 times per year. (Factual Finding 70.) This faux pas is clearly a procedural violation, however, the ultimate impact on Student and Parents is nil. (Legal Conclusions 10, 11, 13, 14, 16 and 17.) At the IEP meeting, the Gallagher OT IEE was presented and discussed. The IEE report determined OT services were unnecessary for Student. Student did exhibit OT related sensory behaviors, but her OT needs were being met in the classroom. Student's abilities were functional and she exhibited no behaviors which created a barrier to her education. (Factual Findings 30 through 41.) Ms. Penwarden, Student's District OT, also attended the IEP meeting and discussed Student's OT needs. (Factual Findings 43, 44, and 45.) Ms. Penwarden explained at hearing that although Student did not require OT services, she wanted to remain on the case to consult with Student's teacher and CARD aides on an as needed basis. (Factual Finding 71.) Parent raised no other issues regarding Student's OT. The list of complaints Student submitted at the end of the IEP meeting made no reference to OT. Student did not request an IEE of the Gallagher assessment, as she had done with the other IEE's. (Factual Findings 65 and 66.) Other than citing the vagueness of the OT service, Student offered no evidence to suggest that the District did not provide Student with consultative OT, or that Student's education suffered by the omission of the identification of the type of OT service which was provided.<sup>13</sup>

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<sup>13</sup> Dr. Morris determined Student had OT deficits primarily in adaptive skills and maladaptive behaviors. Dr. Morris did not assess Student until a year after the May 9, 2011 IEP, and did not attend the 2011 IEP meeting. Further, once her assessment was completed, her written report, findings and recommendations were never provided to the IEP team.

31. Student's communication goals are also lacking in information. Each of Student's communication goals fail to include short term objectives. As a result, Parents contend that they cannot measure Student's progress (or lack thereof). While the inclusion of short term goals would have assisted tracking Student's progress on the goal throughout the year, the omission of such short term goals does not invalidate the annual goal itself. The measurement which determines "meeting" or "not meeting" a goal is determined on the basis of the annual review of the goal. Further, parental participation in the IEP is based on the development of the goal based upon the end result, not by the short term results. Mother also considers the goals to be incomprehensible or "understandable only by a special education teacher." (Factual Finding 69.) In testimony, Dr. Morris also found some of the goals to be generically confusing. Primarily, however, she, as well as Mother, questioned the goal baselines and PLOP's which did not correlate to her assessment findings. (Factual Finding 146.)

32. An IEP must include a statement of measureable annual goals including academic and functional goals designed to meet the child's needs that result from the child's disability. The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child's other educational needs that result from the child's disability. Ultimately, Dr. Morris acknowledged that (with the exceptions of the omissions described above) the 2011 and 2012 IEP's covered all areas of Student's needs, however she would have expanded the goals within those areas and added more goals to address social interaction, self-direction and integrated play<sup>14</sup> (Factual Finding 146.)

33. Student's goals in the May 8, 2012 IEP were better crafted. Again, Parents provided the IEP team with a written dissent which contained complaints regarding the goals. Parents complained the goals were misnumbered or out of sequence.<sup>15</sup> Once again, Student considered the goals to be vague and immeasurable as well as inappropriate for Student. Other than this generic complaint, Parents presented no specific questions regarding the goals and offered no other input to assist in making the goals more appropriate. Oddly, Student complained that the District had failed to develop goals or strategies to address Student's behaviors or establish why these behaviors were occurring. Student's behaviors were the primary responsibility of CARD, and Parents, consistently and without fail approved all of the CARD goals. (Factual Finding 112.)

34. What it ultimately comes down to is: (1) could the goals be implemented and (2) was it possible for Parents to understand the goals. While the goals could have been more artfully drafted, they provided sufficient information to allow their implementation and determine Student's progress, lack of progress, or completion. Ms. Solomon credibly

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<sup>14</sup> It is noted that the areas of need in which Dr. Morris would have expanded the goals, are the same areas covered by the CARD goals, which she did not discuss or critique.

<sup>15</sup> Ironic, considering the chaos of Student's Exhibit Binder.

testified that she had implemented the communication goals successfully; she collected data on all of them; and Student had made progress on each of them. (Factual Finding 73.)

*Issue Three: Did the District fail to offer Student a FAPE during, but not limited to, the 2012-2013 school year, including the 2012 ESY, by failing to offer Student an appropriate combination of DIS and classroom setting?*<sup>16</sup>

35. Pursuant to the Settlement Agreement, Parents agreed that as of January 24, 2011, Student's placement in the Cottonwood alternative program and implementation Student's 2010 IEP, including goals and DIS services, as amended by the terms of the Agreement, constituted a FAPE. Further, Parents consented to the terms of the March 11, 2011 IEP Amendment, which amended the terms of Student's 2010 IEP to conform with the Settlement Agreement. As a result, Student's educational program from January 31, to May 9, 2011, was based upon the agreed provisions of the Settlement Agreement. (Factual Findings 2 and 57.)

36. Student presents several sub-contentions regarding denial of FAPE due to denial of an appropriate combination of DIS services and classroom setting.

37. First, Student contends that District predetermined both the May 9, 2011 and May 8, 2012 IEP's. Predetermination is a procedural violation which deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. At each IEP meeting, the District presented Parents with a pre-typed IEP document which contained Student's PLOP's and goals which had been prepared in advance of the IEP meeting. Merely pre-writing proposed goals, however, does not constitute predetermination. The test is whether the school district comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made. (Legal Conclusion 12.) With regard to the 2011 IEP, it is clear that there was discussion regarding the contents of the IEP document, as Ms. Mativa, who had pre-typed draft PLOP's and goals, also made handwritten changes and additions to the document. (Factual Findings 60 and 69.) Student contends the District failed to include Parents in the discussion, but rather "shut them down" regarding their request to place Student at Beacon, and minimized their concerns regarding Student's aggressive behaviors. (Factual Findings 68, 69, and 70.)

38. The evidence does not support the contention of lack of parental participation in the IEP process. A parent has meaningfully participated in the development of an IEP

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<sup>16</sup> Student's Closing Argument Brief addressed a contention regarding the qualifications of the District's teachers' credentials. Student's brief is the first mention of this topic as an issue. Student presented no evidence at hearing to challenge the teachers' qualifications. The District was not put on notice of the issue at hearing in order to present a defense. Further, the ALJ was not requested to take judicial notice of any documents or websites. Therefore, this contention will not be addressed as part of the issues presented in Student's complaint.

when he/she is informed of her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (Legal Conclusion 14.) The IEP notes reflect Parents' participation in addressing Student's toileting and transportation issues. Parent's described Student's aggressive behaviors at home. (Factual Finding 65.) Mother's own testimony that the District minimized their concerns regarding Student's aggressive behaviors supports the finding that Parents participated in the IEP. At the end of the IEP meeting, Parent's provided the IEP team with their list of concerns and demands, which the District took for consideration. Further, the District responded to some of Parents' requests, as was evidenced by Ms. Mativa's inclusion of grade level on the goals, and Ms. Wolter's provision of PWN denying Student's placement at Beacon. (Factual Findings 66 and 74.)

39. Parent's participation in the May 8, 2012 IEP meeting is even more evident. The testimony of Mr. Perez indicated that the Canyon Lake program was discussed, and parents indicated they wanted to observe the Canyon Lake placement. (Factual Findings 107 and 109.) Mr. Cleave testified that Parents, who were represented by counsel, initially participated in the discussions, then stopped. At no time were Parents prevented from participating, and they were given opportunities to participate. Parents and their attorney continued to participate in the IEP by providing the IEP team with a written dissent which was attached to the IEP document. (Factual Findings 108, 112 and 113.) Ms. Martinez testified Parents participated in an open discussion of Student's goals and behaviors. (Factual Finding 122.)

40. The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (Legal Conclusion 14.) Disagreement is not predetermination, nor is it determinative of a lack of parental participation. The District is not required to agree with Parents, nor is the District required to place Student in a program preferred by Parents, even if that program will result in greater educational benefit to the child. (Legal Conclusion 13.) While Parent's participation in each of the IEP's was not as productive as they may have wished, they were nonetheless provided an opportunity to participate, and did, in fact, participate in the IEP process. The District did not predetermine Student's IEP's or prevent Parents from actively participating in the IEP process.

41. Next, Student's Closing Argument Brief contends the IEP team prevented Ms. Martinez from presenting the CARD goals at the May 9, 2011 IEP meeting. This misstates the testimony. Ms. Martinez testified that there was insufficient time for her to present the 14 CARD goals on May 9, 2011, and therefore, the CARD goals were formally presented at the September 19, 2011 IEP meeting. (Factual Findings 65, 76, and 79.) Student's companion contention regarding the District's failure to have a complete IEP in place by the beginning of the 2011-2012 school year, is also misplaced. The parties were simply unable to complete Student's IEP on May 9, 2011, and were therefore required to hold a subsequent IEP to complete the offer of FAPE, and, to among other things, introduce and discuss the CARD goals.

42. Assuming the District's failure to have a completed IEP in place, represents a procedural violation of the law, it does not rise to the level of a denial of FAPE. (Legal Conclusion 11.) Courts allow a school district to cure its procedural defects with a subsequent IEP meeting. (Legal Conclusion 19.) The District held the subsequent IEP meeting on September 19, 2011, less than one month from the beginning of the school year and completed its offer of the CARD goals and services, which Parents accepted in total. (Factual Findings 76 and 79.) Further, Ms. Martinez's testimony supports a finding that Student was not disadvantaged by this delay, as Student had a BIP in place, and Ms. Martinez, Parents and Ms. Mativa had agreed to implement the CARD goals prior to their subsequent adoption in September. (Factual Finding 65.)

43. Student further contends that the May 9, 2011 IEP did not comport with the Settlement Agreement. The relevance of this contention remains a mystery, and unexplained by Student. The Settlement Agreement pertained to the determination of FAPE for the 2010-2011 school year. The only relevance the Agreement bore to Student's 2011 annual IEP was the agreement that, in the event of a subsequent dispute between the parties, the offer of placement and services contained in the 2010 IEP as amended by the Settlement Agreement would constitute the stay put placement and services for Student. The existence of a mutually agreed upon stay put IEP also technically contradicts Student's argument that there was no IEP in place for Student at the beginning of the 2011-2012 school year.

44. Student next contends the May 8, 2012 IEP offered Student placement in a non-existent program in a non-existent classroom. To support her claim, Student relies heavily on *Student v. Yucaipa*, OAH Case No. N2007090402 (March 2008), a decision with which this ALJ is extremely familiar. The facts in *Yucaipa* are similar to those in the case at hand, to the extent that, at the time the District made its offer of placement to Student, the proposed placement was newly conceived, still in the planning stages, and did not yet have a physical location to be observed. The ALJ held that in those cases where a student's program is "to be announced" or where, the district unilaterally changes the program (after the IEP) the parents have been unable to realistically participate in a meaningful IEP meeting. When a school district describes a prospective program to parents, and that program fails to come into existence as described, the end result is a procedural violation which has denied the parent meaningful participation in the IEP process, and thereby denies the student a FAPE.

45. The *Yucaipa* case also noted that there was no legal authority which required a classroom to be in existence as of the date of the student's IEP meeting, or which mandated parental observation of the exact classroom offered to a student. In *Yucaipa*, the ALJ held that a proposed placement exists to the same extent as any other class scheduled for the following year. Further, the dilemma created by Mother being unable to "see for herself" is not determinative of a denial of FAPE, but certainly is a factor in her ability to fully participate in the IEP process.

46. In the instant case, Student contends that the District did not provide Parents with any meaningful description of the proposed Canyon Lake classroom setting, and at the



time of Mother's observation of the Canyon Lake SDC's she was informed that the then existing classrooms were unsuitable for Student. Parents' claims are contradicted by the evidence. As described by Ms. Wolter, the District's alternative program was initially developed on the elementary school level. Parents were acutely aware of the purpose and dynamics of the alternative program as it existed at Cottonwood, and were vehemently opposed to Student's continuing in the program. The need for extending the Cottonwood alternative program to the middle school at Canyon Lake only occurred as pupils, like Student, aged out of the elementary school setting. The Canyon Lake classroom was adequately described to Parents at the May 8, 2012 IEP meeting, and the description of the proposed *program* was actually a reiteration of a description of the Cottonwood alternative program, only for older students and in a different location. The fruition of the Canyon Lake alternative program for the 2012-2013 school year, was as described to Parents. (Factual Findings 107 and 151.)

47. Further, Student's *Union* argument does not support a finding that the IEP was insufficient because the placement did not exist at the time of the IEP meeting. A change in the *placement location* is not a change in *placement*. Placement refers to the provision of special education and related services rather than to a specific place. (Legal Conclusion 17.)

48. Also, Mother's visit to Canyon Lake was futile. The evidence indicates that Mother was completely aware that Student's proposed placement at Canyon Lake did not physically exist when she visited. (Factual Finding 149.) Observation of SDC programs which were clearly not recommended for Student, especially with Dr. Morris in tow, merely acted to self-fulfill her prophecy that Student should be placed at Beacon.

49. Lastly, though not clearly articulated in Student's Closing Argument Brief, the true elephant in the room is whether substantively, (1) the Cottonwood alternate program failed to meet Student's educational needs and (2) whether Student's maladaptive behaviors prevented her from accessing her education.

50. In analyzing these issues, several foundational facts have been established. First, Student has moderate to severe autism. She also possesses cognitive deficits which impact her learning abilities. Student's maladaptive behaviors have been significant and aggressive on more than a few occasions. Although not recounted in this decision at length, Parents' descriptions and painstakingly documented recounting of Student's maladaptive behaviors are not disputed by the ALJ, and the Parents' pain and frustration is understandably visceral. It is also clear a mutually trusting and respectful relationship between Parents and the District has been lost and may never be regained. Nonetheless, a determination of denial of FAPE cannot be made based on emotions or frustration.

51. The Cottonwood class educated six special education students, three of whom were autistic. There was one classroom aide, and three of the children, including Student, had 1:1 aides. CARD provided Student's 1:1 behavioral aide. (Factual Finding 11.) Student's teacher worked in collaboration and consultation with CARD regarding Student's behaviors. (Factual Finding 15.) The OT therapist created sensory diets for Student and

provided sensory aids for Student in the classroom. Student also had access to the sensory room. (Factual Finding 16.) The class was also richly language embedded. (Factual Finding 78.) None of these findings regarding the alternative program were disputed by Student.

52. Parents have repeatedly conveyed their steadfast beliefs that the alternative program is inappropriate for Student. They consider the placement responsible for increasing Student's maladaptive behaviors due to her exposure to other students' negative behaviors. Further, the academic curriculum was too difficult for Student. (Factual Findings 2, 58, 70, 77, and 112.) As a result, Parents maintain that Student has made no academic progress and has actually regressed since being placed in the Cottonwood classroom. To support their contention, Parents point to the fact that as of the May 9, 2011 IEP meeting, Student had met few of her annual goals, and the same communication goals from 2010 were offered as they remained unmet. (Factual Finding 63.)

53. Further, Parents significantly relied on Dr. Morris's assessment to substantiate their belief that Student has regressed. This conviction is primarily based on Dr. Morris's 2012 assessment results and a comparison of her assessment to that of Dr. Patterson in 2010. (See Dr. Patterson's assessment, Factual Findings 4 through 9, and Dr. Morris's assessment; Factual Findings 129 through 143.) The comparisons, however, are misleading. There is a two year gap in the testing, and the age of Student, as well as the use of several different assessment tools. Further, while both assessors are qualified and professional, Dr. Morris's assessment was fraught with hindrances in Student's behavior during assessment and Mother's presence during school observations. (Factual Findings 132 and 134.) Comparatively, Dr. Morris's assessment appears flawed. Therefore, to conclude that Student had regressed, based on Dr. Morris's assessment is unmerited.

54. Mother also found the Cottonwood classroom inappropriate based upon her own observations. Mother found the classroom to be noisy and distracting due to the maladaptive behaviors of the other pupils. She believed that Student was consistently separated from group learning activities and was segregated from her peers. (Factual Findings 21 and 132.) Mother's perception of the classroom may have been accurate on those few occasions she visited, but they do not represent the classroom described by those staff members there on a daily basis.

55. Ms. Mativa agreed that when Student was introduced to the fourth grade curriculum she was not successful. However, once an alternate curriculum was introduced, Student began showing success in academic areas. Student was progressing to the first grade level, and was becoming much more independent. (Factual Finding 78.) Ms. Campbell reported that in October 2011, Student's academics were at the beginning kindergarten level; by June 2012, Student was performing at the second grade level. (Factual Finding 21.) Ms. Penwarden, observed a big increase in Student's communication abilities between 2011 and 2012. Ms. Solomon also observed improvements in Student's independence. (Factual Findings 43 and 55.)

56. Parents also believe Student's maladaptive and aggressive behaviors have prevented her from accessing her education or obtaining educational benefit. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (Legal Conclusion 20.) Parents maintain in their communications with the District that Student's most offensive maladaptive behaviors began once she was placed in the alternative program. The evidence is to the contrary. In 2010, Dr. Patterson reported many behaviors, such as pulling out her eyelashes, dunking, and repetitive finger play. He also noted that "although described as not really violent, Student engaged in low frequency high incident activities." (Factual Finding 6.) These types of behaviors continued in some fashion or another throughout Student's placement in the alternative program.

57. Behaviorally, Student presents as a very complicated autistic child. Ms. Martinez, the CARD case supervisor, agrees that Student exhibited maladaptive behaviors in 2011, including non-compliance, self-stimulation, and toileting. Based upon the data collected, CARD determined that most of Student's behaviors were attention seeking or task avoidance. In spite of the data collection, the BIP, and positive reinforcements, as one behavior was extinguished, another behavior would replace it, or the old behavior would later reemerge. (Factual Findings 44, 56, 85, and 87.) CARD's Quarterly Reports were based upon the data collected and consistently reflect that Student's behaviors were appropriately defined and were appropriately addressed in the BIP in which the CARD aides provided appropriate prompts and positive reinforcements throughout the day. (Factual Findings 23 through 29 and 81 through 87.) According to Ms. Campbell, who worked extensively with Student, Student did not adopt the negative behaviors of the other students. Further, a majority of the time she did not exhibit negative behaviors. (Factual Finding 20.) While Mother saw her child in a downward spiral and her behaviors outside of school becoming more aggressive, the District saw none of this.

58. Ms. Martinez's testimony was persuasive regarding Student's behaviors. She had the benefit of monitoring Student both at school and at home. CARD recorded data and monitored Student's behavior on a daily basis. She acknowledged that many of Student's behaviors had no clear function. (Factual Finding 131.) She believed Student made progress at school. Student became less prompt dependent and more independent. Student had a full range of supports in the classroom and access to the OT lab. Based upon her observations and the data collected by CARD, Ms. Martinez found the Cottonwood program an appropriate placement for Student in which Student made progress. (Factual Finding 91.) Ms. Basye, Student's CARD 1:1 aide also believed Student was progressing in both behavior and academics. Ms. Basye also reminds us that maladaptive behaviors are part of Student's disability. (Factual Finding 94.)

59. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. Further, there are many behaviors that impede a child's learning that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (Legal Conclusion 20.) In both 2011 and 2012, the IEP team did consider Student's behaviors when

crafting the IEP, which resulted in the utilization of CARD to assist in developing and implementing Student's behavioral goals; collecting data on Student's behavior; and developing a BIP for Student. (Factual Findings 64 and 104.) The evidence supports a finding that Student's behaviors did not prevent her from making educational progress during the period of January 25, 2011 through June 2012.

60. Further, once Student's behaviors escalated and became more aggressive at school in 2012, and it appeared that CARD's behavior intervention strategies were no longer working, the District called for another IEP meeting in July 2012. Parent's elected not to attend the IEP meeting and did not consent to a FAA to determine if additional or different behavior supports would be appropriate for Student. (Factual Findings 127 and 128.)

61. In summation on this issue, *Rowley* requires that a school district provide a disabled child with a "basic floor of opportunity." Further, an appropriate education under the IDEA does not require a "potential-maximizing education." In essence, the school district must offer a program that "confers some educational benefit upon the handicapped child." (Legal Conclusion 8.)

62. An IEP meets the *Rowley* standard and is substantively adequate if the plan is *likely* to produce progress, not regression, and is *likely* to produce more than trivial advancement. Further, the IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child's intellectual potential. (Legal Conclusion 9.) The focus must be on the placement of the school district, not the alternative preferred by the parents. As stated by Mr. Cleave, the issue for the IEP team was not that Beacon was an inappropriate placement, but that the District placement was appropriate for Student. (Factual Finding 111.)

63. At this point, reflection on Dr. Morris's recommendations and testimony is fitting. At hearing, Dr. Morris acknowledged that all of Student's areas of need had been identified by the District. (Factual Finding 146.) Also, CARD's collection of behavioral data and analysis was appropriate, as well as the CARD behavioral goals. (Factual Finding 145.)

64. Most strikingly, although her assessment report was never submitted to the IEP team, her recommendations as contained in Factual Finding 143, bear an uncanny resemblance to the provisions of Student's IEP's. Dr. Morris recommended a small, language-based classroom that focuses on academics and functional skills. Student continues to require the support of a highly trained 1:1 aide through CARD for the entire school day, as well as continuation of the CARD home program, and monthly consultations. Further, the CARD aide should take ongoing data regarding the goals on a daily basis, and the information shared with the IEP team and Parents on a regular basis. Student required a positive behavior support and intervention plan be built into Student's school day. Also, to prevent regression, Student should receive services on a 12 month basis. (Factual Finding 143.) Amazingly, all of these recommendations are addressed in the alternative program and services offered to Student in each of the IEPs. (Factual Findings 64, 65, 103, and 104.)

65. While Dr. Morris would have expanded the Student's goals, it is not a requirement for the District to prepare an IEP that offers a potential maximizing education for Student. The IDEA modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program (Legal Conclusion 9.) By all professional accounts, Student's IEP's during the period in question addressed Student's areas of need, and provided both goals and supports which were designed to assist Student in making educational progress.

*Issue Four: Did the District fail to offer appropriate ESY services between January 25, 2011, and December 2012?*

66. The May 9, 2011 IEP offered Student ESY placement in a SDC for four weeks. Student's CARD 1:1 aide support was also provided daily for the entire ESY session. Pursuant to parental request, the IEP added Fast4Words to Student's ESY program. Further, Student's 15 hours per week of CARD 1:1 home services, along with eight hours per month of CARD supervision, was continued throughout the summer, even after ESY ended. Student's speech and OT services were also offered throughout the year, including ESY. (Factual Finding 64.)

67. Student failed to present any evidence to establish that Student required any services beyond what was offered and provided. Student's only argument is that on July 14, 2011, Parent notified the District that, during the 2011 ESY, Student was involved in 32 incidents of aggressive behavior. An IEP, however, is evaluated in light of the information available at the time it was developed. (Legal Conclusion 12.) While Parent's list of aggressive behaviors displayed during ESY is not disputed, it is a retrospective judgment of the validity of the ESY offer. As such, it is not determinative of the issue.

68. In the May 8, 2012 IEP the IEP team again offered Student an ESY program with a 1:1 CARD aide daily and continuing DIS services. This year, however, the IEP team was aware of Student's escalating behaviors during 2012, as continually expressed by Parents. Further, Ms. Martinez's concurrence that Student's aggressive behaviors had increased during the summer of 2011. To help address Student's increasing behaviors, Ms. Martinez requested that Student's CARD home program be increased from 15 to 25 hours per week. The District obliged and increased the home program. (Factual Findings 86, 87, 122 and 123.) Student failed to present any evidence to establish that the CARD recommended increase of 10 hours per week of CARD behavioral supports, were inappropriate to as ESY and summer behavior services for Student.

*Issue Five: Is Student entitled to reimbursement for an IEE provided by Dr. Robin Morris, as well as her subsequent observations?*

69. Student's contentions regarding the independent assessments are confusing. In her Closing Argument Brief, Student contends that Parents requested IEE assessments at the May 8, 2012 IEP meeting, due to their disagreement with the *District's* last assessments in the area of Speech and Language and psychoeducational assessment. The evidence reflects

that Parents based their request for IEE on their disagreement with the *last* assessment. (Factual Finding 113.) Clearly, if a parent requests an IEE at public expense, the school district must, without unnecessary delay, either initiate a due process hearing to show its assessment was appropriate or provide the IEE at public expense. (Legal Conclusion 23.) Accordingly, the District's *last* assessments were performed in 2008, a period beyond the two year statute of limitations. Additionally, relating back to the District's 2008 assessments, the District provided Student with a psychoeducational IEE from Dr. Patterson in 2010. (Factual Finding 4.) Further, Parents agreed to a release of all claims under the IDEA and California Education Code existing as of the January 24, 2011 Settlement Agreement. (See pp. 1 and 2 of this decision.) As a result, Student is barred from requesting an IEE based upon the *District's* 2008 assessments.

70. The Settlement Agreement also provided Student with an IEE in Speech and Language, which was obtained from the Encinitas Learning Center, the findings of which were presented at the May 9, 2011 IEP meeting. (Factual Finding 47.) Assuming Parent's request for the IEE's was based simply on their disagreement with Student's *last* assessments, those assessments in question were already IEE's, not District assessments, as required by law. (Legal Conclusion 23.) Further, Student is not seeking new IEE's, but rather reimbursement for Dr. Morris's independent assessment, which was initiated in May 2012, and was never shared with the IEP team. Additionally, although a qualified Clinical Psychologist, Dr. Morris is not a SLP, and is not qualified to provide a Speech and Language IEE. (Factual Finding 129.) This, however, does not excuse the District from providing Parents with PWN or seeking due process to validate their denial of the IEE request. (Legal Conclusions 23 and 24.) The District's failures on this issue are procedural in nature and have neither resulted in a loss of educational opportunity nor seriously infringed upon Parent's opportunity to participate in the IEP process. (Legal Conclusion 11.) Student is not entitled to reimbursement for Dr. Morris's assessment.

*Issue Six: Is Student entitled to compensatory education for the period of January 25, 2011 through December 13, 2012?*

71. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. Based upon the principle set forth in the *Burlington* opinion, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. An award of compensatory education must be reasonably calculated to provide the student with the educational benefits that would likely have accrued from special education services the school district should have supplied in the first place. (Legal Conclusion 25.) In this matter, Student has failed to establish the District denied Student a FAPE during the relevant period of January 25, 2011 through December 13, 2012. Therefore, Student is not entitled to compensatory education resulting from a denial of FAPE.

### PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) The District has prevailed on all issues.

### RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a) (2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b) (2006); Ed. Code, § 56505, subd. (k).)

Dated: May 22, 2013

A handwritten signature in black ink, reading "Judith Pasewark", written over a horizontal line.

JUDITH PASEWARK

Administrative Law Judge

Office of Administrative Hearings